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No. 10-10009

IN THE
Supreme Court of the United States

DONNIE E. JOHNSON,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE: NO DATE OF EXECUTION SET

QUESTION PRESENTED

What legal standard governs the determination whether a movant alleging fraud under Federal Rule of Civil Procedure 60(b) is entitled to an evidentiary hearing to resolve disputed questions of material fact?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Donnie E. Johnson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 605 F.3d 333. The order of the district court denying petitioner's motion for relief from judgment (Pet. App. 27a-57a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 2010. Pet. App. 1a. The Sixth Circuit denied petitioner's timely petition for rehearing on September 10, 2010. Pet. App. 26a. On November 29, 2010, Justice Kagan extended the time to file a petition for writ of certiorari to and including February 7, 2010. App. 10A533. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT RULE OF CIVIL PROCEDURE

The version of Federal Rule of Civil Procedure 60(b) in effect in 2004, when petitioner filed his motion for relief from judgment pursuant to that Rule, provided, in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not personally notified as provided in Title

28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. . . .[1]

STATEMENT OF THE CASE

Petitioner Donnie E. Johnson was convicted and sentenced to death for the murder of his wife based principally on the testimony of a single witness, Ronnie McCoy. At trial, McCoy represented that he was not receiving favorable treatment for his testimony. Johnson sought federal habeas relief on the ground that McCoy had in fact received a deal from prosecutors, but that relief was denied. When he obtained a new affidavit from McCoy's parole officer averring that McCoy had expressly admitted receiving such a deal, Johnson filed a motion to reopen the judgment pursuant to Federal Rule of Civil Procedure 60(b), alleging fraud upon the court. Without holding an evidentiary hearing to determine whether the parole officer's sworn testimony was true, the district court again denied relief. The court of appeals affirmed, holding that Johnson was not entitled to discovery or an evidentiary hearing on his fraud claim unless he could first establish his claim of fraud by "clear and convincing" evidence.

1. In 1985, Johnson was convicted in Tennessee state court of first-degree murder for the death of his wife, Connie Johnson. Johnson was one of two people

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[1] Effective December 1, 2007, Rule 60 was amended. The "savings clause" of Rule 60(b), which provided that the rule "does not limit the power of a court to entertain an independent action to . . . set aside a judgment for fraud upon the court," was recodified in near-identical form as Rule 60(d)(3), and the substance of the rule remains the same.

present around the time of Mrs. Johnson's death; the other was Ronnie McCoy, a convicted felon who was then in a daily work-release program.

McCoy initially denied that he knew anything about the circumstances surrounding Mrs. Johnson's death. However, two-and-a-half weeks after the murder, McCoy suddenly changed his story and admitted that he was involved, but he blamed the murder solely on Johnson. McCoy told law enforcement officials that he had left Johnson and his wife alone for a few minutes; when he returned, Mrs. Johnson was dead, and Johnson confessed to the crime. McCoy admitted that he helped clean the scene of the murder and dispose of the body. He was now coming forward with information about the murder, he told the police, because he did not "need any more time" – *i.e.*, he did not want to return to jail.

Based on McCoy's statement, Johnson was charged with his wife's murder. At trial, McCoy was both the prosecution's main witness and the only witness with first-hand knowledge of the crime. McCoy also testified, outside of the jury's presence but in front of the trial judge, that he did not receive any deal or offer of immunity for his testimony against Johnson. Johnson was convicted and sentenced to death.

Notwithstanding his express admission that he had participated in an attempt to conceal a murder, McCoy was never charged with any crime in relation to Mrs. Johnson's death. The prosecutor, Ken Roach, acknowledged that he could have charged McCoy with several serious crimes, but he indicated that he had declined to do so because he was concerned about

his ability to prove that McCoy was a "willing" participant. He claimed that his decision not to prosecute McCoy was "unrelated" to McCoy's testimony.

On direct appeal, the Tennessee Supreme Court affirmed the conviction. *State v. Johnson*, 743 S.W.2d 154, 155 (Tenn. 1987. The Court denied certiorari. *Johnson v. State*, 485 U.S. 994 (1988). Petitioner's efforts to obtain state post-conviction relief were similarly unsuccessful. *See Johnson v. State*, No. 61, 1991 WL 111130 (Tenn. Crim. App. June 26, 1991); *Johnson v. State*, No. 02-S-01-9207-CR-00041, 1993 WL 61728 (Tenn. Mar. 8, 1993); *Johnson v. State*, No. 02C01-9111-CR-00237, 1997 WL 141887 (Tenn. Crim. App. Mar. 27, 1997).

2. In 1988, McCoy pleaded guilty to unrelated charges of aggravated assault. In his presentencing report, McCoy's parole officer included a statement by McCoy indicating that he had been "granted immunity for turning state's evidence" in Johnson's case.

After his efforts to obtain state post-conviction relief failed, Johnson filed a timely petition for habeas corpus in federal district court. Among other things, he alleged that the prosecutor had withheld evidence of a deal with McCoy in violation of his obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). In reply, the State submitted affidavits from McCoy and Roach indicating that no such deal existed. In support of his *Brady* claim, Johnson presented McCoy's presentencing report that included his statement that he had received "immunity for turning state's evidence." In opposition, the State filed an affidavit from McCoy in

which he reaffirmed his denial of any deal, saying that he "d[id] not know why" the report contained such a statement.

The district court denied habeas relief. With respect to the substance of Johnson's claim, the court stated that Johnson "failed to present any credible evidence that the State had entered into a 'deal' for Mr. McCoy's testimony." Pet. App. 62a. The court credited the "unambiguous sworn denials" of McCoy and Roach over what it described as the "various ambiguous bits of evidence put forward by petitioner." Pet. App. 66a. The court therefore concluded that "there was no 'deal.'" *Id.* The district court granted a certificate of appealability on another of Johnson's claims; a divided panel of the Sixth Circuit affirmed on that issue. *Johnson v. Bell*, 344 F.3d 567, 569 (6th Cir. 2003), *cert. denied*, 541 U.S. 1010 (2004).

3. After further diligent investigation, Johnson secured an affidavit from the parole officer who had recorded McCoy's statement in his 1988 presentencing report. The affidavit indicates that the information in presentence reports is generally "obtained from records and individuals with pertinent knowledge, including the defendant." Mot. for Equitable Relief, App. 2, *Johnson v. Bell*, No. 97-3052-BBD (W.D. Tenn. Oct. 13, 2004). The parole officer then specifically affirmed, under penalty of perjury and in direct contradiction to the McCoy and Roach affidavits, that the statement in the presentencing report regarding McCoy having been "granted immunity for turning state's evidence . . . came from Ronnie Joe McCoy." *Id.*

a. With the parole officer's affidavit in hand, Johnson filed a motion in the district court for relief from its prior judgment pursuant to Federal Rule of Civil Procedure 60(b), which provides that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; . . . or (6) any other reason that justifies relief." When Johnson filed his motion, Rule 60(b) further provided that the rule "does not limit the power of a court to . . . set aside a judgment for fraud upon the court." *See supra* note 1. Johnson contended that the State's submission of the Roach and McCoy affidavits, which are expressly contradicted by the parole officer's affidavit, constituted a fraud upon the court and tainted the original judgment denying habeas relief. Mot. for Equitable Relief 25-27, *Johnson v. Bell*, No. 97-3052-BBD (W.D. Tenn. Oct. 13, 2004)

Although the two sets of affidavits were fundamentally irreconcilable, the district court denied the Rule 60(b) motion without any inquiry into the conflict in the sworn evidence before it. Pet. App. 53a. Instead, the court deemed the claim procedurally defaulted on the ground that it had not been raised in state court. Pet. App. 44a. The court further held that the Rule 60(b) motion constituted a prohibited second or successive habeas petition. Pet. App. 45a n.6. Moreover, it held, Johnson had failed to state a claim for fraud on the court because he had not alleged that the State knew that the statements in McCoy's and Roach's affidavits were false and

because the alleged fraud was not "directed at the judicial machinery." Pet. App. 51a.

Finally, the district court reaffirmed its earlier rejection of Johnson's claim on the merits, relying on its prior conclusions about the reliability of the McCoy and Roach affidavits. Pet. App. 44a-47a. To the extent that the district court considered the parole officer's affidavit, it focused primarily on what it regarded as Johnson's delay in submitting the affidavit. Pet. App. 46a. But the court reasoned that, "even were the court to credit the parole officer's affidavit as truthful," it "merely" presented his conflicting recollection of the interview that he conducted in McCoy's presentencing proceedings. Pet. App. 46a-47a. And although the court recognized that the affidavit was "perhaps probative" of Johnson's claim that McCoy had an undisclosed deal with prosecutors, it did not regard the affidavit as "compelling," "conclusive," or sufficient to justify further proceedings. Pet. App. 47a.

b. On appeal, Johnson argued that he was, at a minimum, entitled to an evidentiary hearing on his fraud claim. A divided panel of the Sixth Circuit affirmed.[2]

As an initial matter, the court of appeals agreed with Johnson that his Rule 60(b) motion was not a prohibited second or successive habeas petition. Pet. App. 12a (citing *Carter v. Anderson*, 585 F.3d 1007,

[2] The court characterized Johnson's notice of appeal as a request for a certification of appealability, which it then granted, finding that "petitioner has produced a modicum of evidence in support of this claim." Pet. App. 11a.

1011 (6th Cir. 2009)). It also recognized that "there is some evidence that McCoy received favorable treatment based upon his testimony," but in its view the evidence did not "*definitively* establish[] that a deal with the prosecution did, in fact, occur." Pet. App. 12a. Because Johnson had failed to produce "clear and convincing" evidence that prosecutors had presented false material to the district court, the panel majority held, he was not entitled to an evidentiary hearing. *Id.*

Judge Clay dissented, concluding that Johnson's claim "undoubtedly raised sufficient questions which should entitle him to an evidentiary hearing." Pet. App. 18a (Clay, J., dissenting). In Judge Clay's view, it would be "incredible to contend that a witness" such as McCoy, who was a convicted felon on work release, "would give such incriminating testimony" – implicating himself in an attempt to conceal a murder – "with no assurance of immunity from prosecution." Pet. App. 19a. Thus, in light of the substantial allegations of fraud upon the court, "the proper course would have been to hold an evidentiary hearing" at which witnesses could be called and subjected to cross-examination. Pet. App. 22a. Without such a hearing, Judge Clay continued, prosecutors could "merely file unchallenged affidavits where the very nature of the evidence allegedly withheld prevents Petitioner . . . from discovering irrefutable proof that a deal existed." Pet. App. 24a.

The court of appeals denied rehearing and rehearing en banc. Pet. App. 26a. This petition followed.

REASONS FOR GRANTING THE WRIT

This Court's intervention is warranted to resolve a conflict over the standard that a movant under Rule 60(b) must meet to obtain an evidentiary hearing on his claim of fraud on the court. The Sixth Circuit's holding – that to be entitled to an evidentiary hearing at which to prove his claim of fraud, Johnson was first required to prove his claim by "clear and convincing evidence" – directly implicates a square conflict among the circuits. The Sixth Circuit's position defies logic – with devastating consequences in this capital case – by providing evidentiary hearings only to movants who do not need them, because they already have enough evidence of fraud to win their claims without a hearing. This case is an ideal vehicle in which to resolve the question presented because three other circuits – the First, Second, and Seventh – would conclude that Johnson is entitled to an evidentiary hearing based on the conflicting sworn affidavits regarding the truth of McCoy's testimony.

I. The Court Should Resolve The Intractable Circuit Conflict Over The Legal Standard For Allowing An Evidentiary Hearing When A Movant Alleges Fraud Under Rule 60(b).

In addition to making no sense, the Sixth Circuit's holding that petitioner was not entitled to an evidentiary hearing because he did "not come forward with clear and convincing evidence" conflicts with the holdings of three other circuits. Because the question frequently arises and is of critical importance to the proper administration of justice,

particularly in the capital context, the Court should grant review.

A. The Circuits Are Irreconcilably Divided.

1. The First, Second, and Seventh Circuits all hold that a Rule 60(b) movant is entitled to an evidentiary hearing if she makes a "colorable claim" of fraud, while two other circuits – the Sixth and the Tenth – have held that a district court does not abuse its discretion in failing to hold an evidentiary hearing unless the Rule 60(b) movant produces "clear and convincing" evidence of fraud.

Johnson would have received an evidentiary hearing in the First Circuit. In *Pearson v. First New Hampshire Mortgage Co.*, the court of appeals expressly rejected a lower court's conclusion that an evidentiary hearing was not warranted unless the movant alleging fraud on the court could produce a "smoking gun" demonstrating the fraud. 200 F.3d 30, 34-35 (1st Cir. 1999). In that case, a Chapter 7 debtor filed a motion pursuant to Federal Rule of Bankruptcy Procedure 9024 – which explicitly adopts Rule 60(b) – arguing that a settlement had been procured through fraud on the court because the trustee had colluded with the debtor's attorney and the bank to reach a settlement that was adverse to the debtor's interests. *Id.* at 34. The district court affirmed the bankruptcy court's order denying the motion to reopen without a hearing, but the First Circuit reversed, reasoning that such a standard could result in "claimants who have been denied both preliminary discovery and an opportunity to present witnesses" being "left with no meaningful access to

direct evidence of fraudulent intent, notwithstanding an abundance of telltale circumstantial evidence." *Id.* at 35. In its view, because "the record plainly includes considerable evidence of serious conflicts of interest which could tend to divide [Pearson's attorney's] loyalties," *id.* at 37, Pearson had raised a "colorable claim" of fraud, *id.* at 34-42, and it remanded the case to the lower court. *See also Roger Edwards, LLC v. Fiddes & Son Ltd.*, 427 F.3d 129, 137 (1st Cir. 2005) (holding that a Rule 60(b) fraud evidentiary hearing was not necessary only because the movant "points to nothing in this case that could be unearthed by discovery or proved in an evidentiary hearing that would alter our analysis").

The Seventh Circuit has adopted the same "colorable claim" standard. In *Ty Inc. v. Softbelly's, Inc.*, that court held that the district court had abused its discretion when it failed to hold an evidentiary hearing despite conflicting evidence of fraud. 353 F.3d 528, 537 (7th Cir. 2003). The Rule 60(b) movant in *Ty* contended that the defendant had committed fraud on the court by intimidating a witness to prevent him from testifying at an upcoming trial. Although the defendant denied that that he had tried to persuade the witness not to testify, the movant presented testimony from the witness that he had "realized after speaking to [the defendant] that it was a very important matter to him . . . [and] if he felt that strongly about it, . . . maybe it would be best if I did not go [testify]." *Id.* at 534-37. The Seventh Circuit expressly acknowledged that, with the conflicting evidence regarding the defendant's possible efforts to intimidate the witness, the movant could not meet the "clear and convincing"

evidence standard. *Id.* at 537. But, it continued, the conflicting evidence "required further investigation by the judge." *Id.*

Johnson would also be entitled to an evidentiary hearing in the Second Circuit. In *Madonna v. United States*, that court agreed that to justify relief from judgment, "an action for fraud on the court under Rule 60(b) must be established by clear and convincing evidence." 878 F.2d 62, 64-65 (2d Cir. 1989). But it also made clear that, before discovery and an evidentiary hearing, a Rule 60(b) movant "need not meet this high burden of proof. . . . [I]t is enough to allege facts which, when assumed to be true, would amount to fraud on the court." *Id.* at 65; *see also Hadden v. Rumsey Products*, 196 F.2d 92, 96 (2d Cir. 1952) (remanding to the district court to take evidence to decide the merits of the 60(b) motion).

Similarly, in *Rothenberg v. Kamen*, the Second Circuit held that when a plaintiff brings forward a "colorable claim" of fraud, the district court may not dismiss this claim without an evidentiary hearing. 735 F.2d 753, 754-55 (2d Cir. 1984). In that case, the plaintiff sought to reopen a patent royalties settlement agreement that was allegedly procured by fraud. *Id.* at 753-54. During the settlement negotiations, an attorney for the defendant stated that future sales of the patented product were "unpredictable." *Id.* at 754. Ten days later, however, he explained in a letter that the defendant had plans to replace the existing patented product with new technology. *Id.* The Second Circuit remanded the case, *id.* at 755, holding that because the plaintiff raised a "colorable claim" of fraud, he was entitled to an evidentiary hearing to determine whether the

defendant's counsel knew of the new technology plan when he claimed future sales were "unpredictable." *Id.*[3]

2. In contrast to the "colorable claim" standard employed in the First, Second, and Seventh Circuits, the Tenth Circuit – like the Sixth Circuit in this case – has adopted a far more stringent "clear and convincing evidence" standard for obtaining an evidentiary hearing on a Rule 60(b) motion. In *Thomas v. Parker*, 609 F.3d 1114, 1120 (10th Cir. 2010), as in this case, the court of appeals recognized that the movant had provided some evidence of fraud, including that the defendant had "submit[ted] incomplete evidence or ma[de] assertions that arguably [were] incorrect." However, it nonetheless agreed with the district court that the Rule 60(b) movant was not entitled to an evidentiary hearing on his fraud-on-the-court claim because the defendant

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[3] Because *Rothenberg* involved a motion to reopen a settlement agreement, which is closely analogous to a Rule 60(b) motion, both the First and Second Circuits have cited it in cases involving Rule 60(b) motions alleging fraud on the court. *See United States v. U.S. Currency in Sum of Six Hundred Sixty Thousand, Two Hundred Dollars*, 242 Fed. Appx. 750, 752 (2d Cir. 2007) (citing *Rothenberg* for the proposition that when, "as here, the movant fails to make even a 'colorable claim' for Rule 60(b) relief, the district court is not required to consider evidence offered in support of that motion"); *see Pearson*, 200 F.3d at 35 (citing *Rothenberg* as an analogous example to support the "colorable claim" standard for a 60(b) fraud motion). Rule 60(b), in turn, applies the same standards to motions to reopen habeas cases as other civil proceedings. *See, e.g., Gonzalez v. Crosby*, 545 U.S. 524 (2005).

"fail[ed] to offer clear and convincing evidence to support his allegations." *Id.*

At this case illustrates, the Sixth Circuit applies the same stringent standard, denying Rule 60(b) motions without an evidentiary hearing if the movant does not bring forward clear and convincing evidence of fraud. In *Jones v. Illinois Central Railroad Co.*, 617 F.3d 843, 845-46 (6th Cir. 2010), for example, the plaintiff in a negligence suit alleged that the defendant committed fraud on the court by withholding material information and bribing a witness. . The court recognized that, if those allegations were true, they "would certainly warrant a new trial." *Id.* at 853. However, the Sixth Circuit held that "the district court did not abuse its discretion in denying post-trial discovery and an evidentiary hearing," *id.* at 854, because Jones had not provided and the court could "discern in the record . . . clear evidence of such [fraud], and . . . therefore [could not] say that the district court abused its discretion." *Id.* at 853. As in this case, the Sixth Circuit thus would not grant Jones an evidentiary hearing without clear and convincing evidence of fraud. *Id.* at 853-54; *see also Carter v. Anderson*, 585 F.3d 1007, 1012 (6th Cir. 2009) (affirming district court's denial of a 60(b) motion without a hearing because the movant "failed to satisfy the [elements] of fraud on the court by clear and convincing evidence").

B. The Threshold For Granting An Evidentiary Hearing To Resolve Rule 60(b) Fraud Claims Is A Recurring And Important Issue.

Resolution of this case would provide much-needed clarity to the federal courts. Allegations of fraud as a justification for reopening judgments under Rule 60(b) arise regularly, in all kinds of civil actions: a search reveals that, in the last three years, the courts of appeals have considered roughly 150 cases involving claims of fraud under Rule 60(b).[4] Yet, at present, this *Federal* Rule of Civil Procedure is applied in dramatically different fashion across the country. That disparity is particularly untenable in the capital context, where the Rule must balance competing interests in fairness and finality that are of the highest order for both defendants and States alike.

More generally, a clear rule regarding the standard that must be met to obtain an evidentiary hearing will discourage frivolous Rule 60(b) motions and reduce the burden on federal courts handling these motions, while simultaneously allowing meritorious claims to proceed to definitive resolution. Given the volume of civil litigation in the federal courts, and the fact that the Rules apply equally to all civil cases, courts are dealing constantly with the standards for disposing of motions under Rule 60(b). The ad hoc and often unpublished resolution of these

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[4] This is the result of surveying the results of a Westlaw search for "FRAUD" in the same sentence as "60(b)."

motions confuses litigants about the standards applied in determining whether a hearing will be allowed. Given the uncertainty, many litigants err on the side of asking for a hearing. Thus, the lack of clarity in the standards under which courts are currently operating affirmatively encourages Rule 60(b) motions and leads to an increased incidence of appeals from Rule 60(b) rulings. Without a clearer standard for when an evidentiary hearing should be granted, litigants will continue to try their luck and ask for judgments to be reopened – and with no guidance in either direction, litigants as well as courts will continue to operate under an umbrella of unnecessary confusion.

II. This Case Is An Ideal Vehicle For Resolving This Important Question.

This case is an ideal vehicle in which to resolve the circuit split.

The facts of this case squarely present the conflict. In the First, Second, and Seventh Circuits, petitioner would be entitled to an evidentiary hearing because he can make the "colorable claim" required under those circuits' precedent. Johnson's Rule 60(b) motion alleged that the denial of his habeas petition was procured by fraud because the State knowingly submitted a false affidavit from the original state prosecutor (Roach) which stated that prosecutors had not made a plea deal with McCoy for his testimony against Johnson. Johnson supported this claim with a presentencing report from McCoy's parole officer which memorialized McCoy's statement "that he was granted immunity for turning state's evidence" in Johnson's case, Pet. App. 12a, as well as an affidavit

from McCoy's parole officer confirming the accuracy of the presentencing report. Pet. App. 10a. In response, the State relied on the earlier affidavits from both McCoy and Roach indicating that McCoy had not been provided with a plea deal. Even the Sixth Circuit in its opinion conceded that "there is some evidence that McCoy received favorable treatment based upon his testimony." Pet. App. 12a.

And indeed, this is at least as strong as – if not stronger than – the kinds of "colorable claims" that courts in the First, Second, and Seventh Circuits have found to warrant an evidentiary hearing. *See Rothenberg*, 735 F.2d at 754-55 (ordering evidentiary hearing in face of competing testimony); *Pearson*, 200 F.3d at 34 (holding that movant had demonstrated "colorable claim" of fraud regarding a conflict of interest, when he provided supporting evidence that included statements by the bankruptcy court in an earlier proceeding regarding the existence of a conflict and documentary evidence that law firm had been representing "materially adverse interests"); *Ty*, 353 F.3d at 537 (holding that the district court had abused its discretion in failing to hold an evidentiary hearing despite conflicting evidence of fraud).

This case cleanly presents the question presented, without any procedural impediments that would prevent this Court from resolving it. The court of appeals agreed that Johnson's Rule 60(b) motion was not a prohibited second or successive habeas petition, and it granted a certificate of appealability on the Rule 60(b) issue. Pet. App. 11a. Moreover, in his court of appeals brief, Johnson expressly asked that court to "remand for further proceedings, including an evidentiary hearing," Petr. C.A. Br. 12 –

a request that the Sixth Circuit denied. Pet. App. 12a-13a.[5]

That the question arises in this case in the context of a habeas proceeding is also no impediment to resolving the broader circuit conflict over the standard for granting evidentiary hearings to resolve Rule 60(b) motions. Rule 60 applies equally, and in the same way, to all civil judgments, including habeas judgments. *See, e.g.*, Fed. R. Civ. P. 1 (providing that Federal Rules govern "all civil actions and proceedings in the United States District Courts"); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (holding because a prior "decision was based on [the] interpretation and application of Rule 8," it articulated the standard "for 'all civil actions'"). Thus, in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), this Court rejected any claim that the basic standards of Rule 60 are somehow displaced in the habeas context, explaining that the Rule is "as legitimate in habeas cases as in run-of-the-mine civil cases." *Id.* at 534.

Finally, there can be no dispute that the question presented is important. The application of the wrong standard for granting an evidentiary hearing will have serious consequences for any case, as it leaves the movant subject to a civil judgment that may have been fraudulently procured without any opportunity to fully air his allegations of fraud on the court.

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[5] Although the court of appeals did not address any of the alternative arguments advanced by the State to support denying Johnson relief, those questions would all be left for the court of appeals to address on remand from this Court.

In capital cases, the stakes are obviously even higher: Johnson faces the prospect of being executed without ever having the opportunity to properly present a claim of fraud on the court that even the Sixth Circuit described as being supported by "at least some evidence." The crux of Johnson's fraud-on-the-court claim is directly conflicting affidavits, the veracity of which cannot be properly assessed without an evidentiary hearing. Critically, if the evidence supporting his allegations were proven true at an evidentiary hearing – if the court concluded that the prosecution and its principal witness lied to the court about the existence of deal for the witness's testimony – there could be no question that he would be entitled to have his habeas proceedings reopened. But, without such an opportunity, Johnson will face execution while a material disputed fact regarding fraud on the court remains unresolved.

III. The Decision Below Is Wrong On The Merits.

Certiorari also is warranted because the Sixth Circuit's ruling is wrong on the merits. If, considering all of the available evidence, a Rule 60(b) movant raises a colorable claim of fraud on the court, he should at a minimum receive an evidentiary hearing if it would allow him to prove his case. This is the correct standard for three principal reasons. First, it avoids the logical paradox that would arise if Rule 60(b) movants were entitled to hearings only when, in essence, they already have sufficient proof to win their claim on the merits. Second, the rule strikes the proper balance between furthering the court's interest in the integrity of its decisions with the need to efficiently dispose of unmeritorious

claims. Third, the "colorable claim" standard accounts for the difficulty of obtaining direct evidence, which can be particularly burdensome to obtain in cases alleging fraud.

1. In the Sixth Circuit, a Rule 60(b) movant such as Johnson is entitled to an evidentiary hearing to prove his fraud-on-the-court claim only if he can show "clear and convincing evidence" of fraud based solely on the facts he can muster himself, without discovery or the ability to compel testimony from, and cross-examine, witnesses. Pet. App. 12a. In so holding, the Sixth Circuit conflates the standard of proof necessary to *prevail* on a fraud-on-the-court claim with the standard necessary to *move forward* on a possibly meritorious claim. *Cf. Carter v. Anderson*, 585 F.3d 1007, 1011-12 (6th Cir. 2009) (demanding "clear and convincing evidence" to prevail on fraud on the court claim). Requiring an applicant to prove his case on the merits to be entitled to an evidentiary hearing – which he no longer needs – makes no sense.

The real effect of such a rule, as Judge Clay recognized in his dissent in this case, is the predictable denial of meritorious claims of fraud on the courts, to the detriment of defendants and the judicial system alike. Judge Clay explained that conflating the standard of obtaining a hearing with the standard for relief on the merits "allow[s] the prosecution to merely file unchallenged affidavits" to definitively end the inquiry into the potential fraud. Pet. App. 24a. Thus, in this case, Johnson must ultimately prove by clear and convincing evidence that prosecutors knew that the affidavits that they had submitted in his federal habeas proceedings were

false. Because those affidavits deny that prosecutors and McCoy had struck a plea deal in exchange for his testimony against Johnson, the *only* possible way to prove by clear and convincing evidence that they are fraudulent would be to undermine those statements through cross-examination or additional discovery. But the Sixth Circuit's holding would deny Johnson that very opportunity unless he can produce clear and convincing evidence of the fraud at the outset – evidence that, almost by definition, can only be obtained through adversary proceedings.

Under the Sixth Circuit rule, the evidentiary hearing is denied its most important and effective role – allowing the fact finder to resolve credibility issues on the basis of live testimony and cross-examination. *See, e.g.*, *California v. Green*, 399 U.S. 149, 158 (1970) (observing that live cross-examination is the "greatest legal engine ever invented for the discovery of truth"); *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) (noting that our legal system "assumes that adversarial testing will ultimately advance the public interest in truth and fairness"). The hearing serves little function if, before granting it, the court must first resolve (or ignore) the conflicting testimony the hearing is meant to test.

2. The "colorable claim" standard, on the other hand, avoids the illogic of the Sixth Circuit's rule while preserving the proper balance between the need to ensure the fundamental integrity of a proceeding and the need to limit endless litigation over judgments that have already been entered. Under that test, the relevant inquiry is whether the record as a whole contains "telltale circumstantial

evidence" that could lead, after an evidentiary hearing, to a successful motion to reopen the prior judgment. *Pearson*, 200 F.3d at 35; *see also Ty Inc.*, 353 F.3d at 537.

This test is consistent with the standard for allowing an evidentiary hearing on the merits of a federal habeas claim – a particularly apt analogy, because habeas proceedings too are directed at reopening a prior judgment and, therefore, must balance the important interests in fairness and finality. As this Court explained in *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007), "[i]n deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." Thus, "if the record *refutes* the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Id.* (emphasis added).

Like the habeas standard, the Rule 60(b) "colorable claim" test allows courts to protect the fundamental fairness of the legal system without unreasonably burdening district courts with a slew of meritless evidentiary hearings.[6] It is well-settled

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[6] Similarly, there is no reason to believe that evidentiary hearings on Rule 60(b) motions will be lengthy and burdensome for district courts, as such hearings do "not constitute a trial," but instead may be "limited in scope and purpose." *E.g.*, *W. Reserve Oil & Gas Co. v. Key Oil, Inc.*, 626 F. Supp. 948, 951 (S.D.W. Va. 1986).

that a "court need not hold a hearing on a motion for relief from a judgment if the motion clearly is without substance and merely an attempt to burden the court with frivolous contentions," 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2865 (2010). Moreover, because Rule 60(b) relief is available only in "extraordinary circumstances," a Rule 60(b) movant will only be entitled to a hearing if his motion alleges a serious fraud that, if true, would substantially undermine the integrity of a prior proceeding.

To be sure, more claims would proceed to a hearing under the "colorable claim" rule, imposing some marginal cost to the States' interests in finality. But this Court has admonished that Rule 60 is a "provision whose whole purpose is to make an exception to finality." *Gonzalez*, 545 U.S. at 529. It cannot serve its intended function if applicants are pervasively denied access to the courts' most basic truth-seeking tools unless they can prove they do not need them.

3. Finally, the "colorable claim" standard is especially appropriate in cases of fraud because documentary evidence that would prove fraudulent intent "is almost never available." 2 Leonard B. Sand et al., *Modern Federal Jury Instructions* §§ 44-4 to -6 (2002) (reproduced as Appendix in Lawrence M. Solan, *Jurors As Statutory Interpreters*, 78 Chi.-Kent L. Rev. 1281, 1311-16 (2003)). It is in fact "a rare case where it could be shown that a person wrote or stated that as of a given time in the past he committed an act with fraudulent intent." *Id.* When, as here, a Rule 60(b) movant "ha[s] been denied both preliminary discovery and an opportunity to present

witnesses," holding a hearing is essential because he "may well be left with no meaningful access to direct evidence of fraudulent intent."[7] *Pearson v. First New Hampshire Mortgage Co.*, 200 F.3d 30, 35 (1st Cir. 1999).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[7] In this case, Johnson has been unable to question McCoy, prosecutor Roach, or the state's federal habeas counsel directly since the original trial.

APPENDIX

APPENDIX A

United States Court of Appeals,
Sixth Circuit.

Donnie E. JOHNSON, Petitioner-Appellant,
v.
Ricky BELL, Warden, Respondent-Appellee.

Nos. 05-6925; 06-6330.

Argued Nov. 19, 2009.
Decided and Filed May 17, 2010.
Rehearing and Rehearing En Banc Denied Sept. 10, 2010.

Before: DANNY J. BOGGS, ALAN E. NORRIS, and ERIC L. CLAY, Circuit Judges.

OPINION

ALAN E. NORRIS, Circuit Judge.

In 1985 petitioner Donnie E. Johnson was sentenced to death for the murder of his wife. Since that time he has initiated numerous legal proceedings in both state and federal court challenging his conviction. In 2003 we considered a petition for a writ of habeas corpus, 28 U.S.C. § 2254, and denied relief. *Johnson v. Bell*, 344 F.3d 567 (6th Cir. 2003). Thereafter petitioner filed two motions for equitable relief in federal district court, which were denied. In this consolidated appeal, we review each of those decisions.

In case number 05-6925, petitioner's motion for equitable relief contended that the prosecution

engaged in misconduct by not revealing to defense counsel that it had granted a key witness, Ronnie McCoy, a deal in exchange for his testimony. According to petitioner, by allowing McCoy to testify that he had not received special consideration, the prosecution knowingly offered perjured testimony at trial and perpetrated fraud on the district court during the subsequent habeas corpus proceedings by submitting affidavits from McCoy and the prosecutor denying the existence of a deal.

In case number 06-6330, petitioner's motion alleged that the prosecutor improperly vouched for McCoy during closing argument.

I

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, places restrictions upon individuals seeking to file second or successive habeas corpus applications: claims presented in a prior application must be dismissed; and those claims omitted from a previous application can be raised in a subsequent application only if there has been a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, or the factual predicate for the claim could not have been discovered previously through the exercise of due diligence and the claim itself, if proven, would establish by clear and convincing evidence that no reasonable juror would have found the petitioner guilty of the underlying offense. 28 U.S.C. § 2244(b)(2). Moreover, before the district court may entertain a second application for a writ of habeas corpus, the petitioner must first seek an order from

the appropriate court of appeals authorizing it. 28 U.S.C. § 2244(b)(3)(A).

Petitioner did not seek leave to file a successive application. Instead he filed the instant motions pursuant to Fed. R. Civ. P. 60(b) and the inherent equitable powers conferred on the federal courts by Article III of the Constitution. In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the Court discussed the interplay between § 2244(b) of AEDPA and Rule 60(b), noting that "for purposes of § 2244(b) an 'application' for habeas relief is a filing that contains one or more 'claims.'" *Id.* at 530. And, such "claims" as contemplated by AEDPA represent "an asserted federal basis for relief from a state court's judgment of conviction." *Id.* Such claims cannot be collaterally attacked through a Rule 60(b) motion. However, the rule continues to have limited viability in the habeas context:

> In most cases, determining whether a Rule 60(b) motion advances one or more "claims" will be relatively simple. A motion that seeks to add a new ground for relief . . . will of course qualify. A motion can also be said to bring a "claim" if it attacks the federal court's previous resolution of a claim on the merits, since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief. That is not the case, however, when a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim *on the*

> *merits,* but some defect in the integrity of the federal habeas proceedings.

Gonzalez, 545 U.S. at 531-32 (footnotes omitted) (emphasis original); *see also Post v. Bradshaw,* 422 F.3d 419, 424-25 (6th Cir. 2005). The Court glossed the final sentence of the passage just quoted in a footnote:

> The term "on the merits" has multiple usages. We refer here to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d). When a movant asserts one of those grounds (or asserts that a previous ruling regarding one of those grounds was in error) he is making a habeas corpus claim. He is not doing so when he merely asserts that a previous ruling which precluded a merits determination was in error-for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.

Id. at 532 n.4 (citation omitted).

As mentioned, the motions for equitable relief under review cited two sources of authority: first, what petitioner terms the district court's "plenary inherent Article III equitable powers to revise or amend a judgment in the interest of justice"; second, Rule 60(b). The district court declined to base its authority upon Article III and instead recognized that Rule 60(b), which is inherently equitable in nature, empowers district courts to revise judgments when necessary to ensure their integrity. We endorse this approach. Rule 60(b)(6) provides that a

district court may grant relief from judgment "for any other reason that justifies relief." This provision confers upon the district court a broad equitable power to "do justice." Particularly in light of the approach taken by Supreme Court in *Gonzalez,* Rule 60(b) represents the sole authority, short of a successive application approved by this court, under which a district court may entertain a challenge to a prior denial of habeas relief.

Before we turn to the substance of this appeal, we must attend to a jurisdictional issue. Just as it places limitations upon successive petitions, AEDPA restricts a petitioner's right to bring an appeal to this court. Before he may do so, he must first obtain a certificate of appealability ("COA") pursuant to 28 U.S.C. § 2253(c). This court has recently clarified that a COA is necessary not only to appeal the initial denial of a writ of habeas corpus, but also to appeal from the denial of a motion brought pursuant to Rule 60(b). *United States v. Hardin,* 481 F.3d 924, 926 (6th Cir. 2007). In neither of the two appeals now before us did petitioner seek a COA. Rather than dismiss the consolidated appeal on that ground, we will construe his notices of appeal as applications for a COA.

II

A. Case No. 05-6925

1. Claim as Raised in the Original Habeas Petition

In his 1997 petition for a writ of habeas corpus, Johnson raised the issue that he seeks to reinvigorate here: that the prosecution violated the "Sixth, Eighth, and Fourteenth Amendments by knowingly presenting false testimony at the guilt stage and withholding evidence that exculpated Mr. Johnson for Mrs. Johnson's murder."

At trial, McCoy testified that he left petitioner and the victim alone for a few minutes on the night of the murder and, when he returned, he saw Mrs. Johnson's bleeding, dead body.[1] According to McCoy, "I got paranoid," and asked petitioner why he had done it, to which petitioner replied, "It just happened." McCoy then helped petitioner clean up the area, which included retrieving the victim's glasses and shoes, and placed them, along with the body, in a van. As related by the Tennessee Supreme Court, the pair eventually left the van in the parking lot of a shopping mall. On cross-examination at trial, McCoy testified that, when he was interviewed by defense counsel, he told him that he "knew nothing" of the death of Mrs. Johnson. He also asserted that he had not received any promises in exchange for his testimony. This latter statement occurred outside the presence of the jury.

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[1] Readers who desire a detailed factual recitation may refer to the opinion of the Tennessee Supreme Court on direct appeal. *State v. Johnson*, 743 S.W.2d 154, 155-57 (Tenn. 1988).

In response to the habeas petition, the State submitted affidavits from prosecutor Kenneth Roach and McCoy. According to Roach, although he recognized that probable cause existed to charge McCoy with serious crimes related to his role in the murder, "I felt it unlikely that it could be proven that his participation was willing." Therefore, he decided not to prosecute, a decision that "was unrelated to his testimony." For his part, McCoy submitted an affidavit stating, "I was given no grant of immunity or made any promises regarding favorable treatment in exchange for my testimony." Petitioner now contends that these affidavits were false and that the State perpetrated fraud on the district court by submitting them.

The district court denied habeas relief. It noted first that none of the claims related to prosecutorial misconduct were raised in state court. After a brief discussion of *Brady v. Maryland,* 373 U.S. 83 (1963), and a review of the alleged prosecutorial misconduct, the court found "that petitioner's claim that the prosecution suppressed evidence of a deal with Ronnie McCoy has been procedurally defaulted." Rather than end there, the court turned to the merits—specifically to the affidavits submitted by Roach and McCoy—before concluding, "[t]he various ambiguous bits of evidence put forward by petitioner are not sufficient to undermine the credibility of the unambiguous sworn denials of every individual with contemporaneous personal knowledge concerning the matter."

2. The Claim Revived as a Rule 60(b) Motion

On October 13, 2004, petitioner filed a motion for equitable relief, the denial of which is before us as case number 05-6925. Specifically, he contended that "[r]elief from judgment is warranted given the intervening legal events and proof that this Court's [habeas] judgment was tainted by fraud, misconduct, and/or misrepresentation." Among the "intervening legal events" to which petitioner alluded was the Supreme Court's decision in *Banks v. Dretke*, 540 U.S. 668 (2004). *Banks* provided that "[w]hen police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." *Banks*, 540 U.S. at 675-76. Petitioner characterized his claim as "virtually identical to the circumstances involves in *Banks*."

In *Banks*, the Court recognized that a petitioner must establish "cause" and "prejudice" for his failure to develop the facts during state-court proceedings. *Id.* at 690-91. To show cause, a petitioner must come forward with evidence that the State suppressed material evidence. *Id.* at 692-93. To show prejudice, the withheld evidence must have been such that it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 698 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)) (internal quotation marks omitted).

The district court denied petitioner's motion. It characterized the claim as involving a combination of improperly withheld *Brady* material and fraud on the court. Turning first to petitioner's contention that he

was entitled to relief by *Banks*, the district court noted: "Unlike the petitioner in *Banks*, Petitioner has failed to exhaust his remedies as to this claim in state courts." In *Banks*, the Court reached cause and prejudice after first concluding that petitioner had exhausted his state-court remedies. *Banks*, 540 U.S. at 690. The district court interpreted *Banks* as follows:

> *Banks* stands for the proposition that a habeas petitioner may avoid a procedural bar in federal habeas proceedings with respect to claims which were alleged in state court but were not fully developed due to the conduct of the state. *Banks* does not excuse a habeas petitioner from a procedural bar with respect to claims he has wholly failed to even allege in the state courts, but subsequently decided to make a go at in the federal courts on the basis of evidence available to him prior to state-court proceedings. Accordingly, because Petitioner failed to exhaust his state-court remedies, he has not demonstrated error in this Court's prior finding of procedural default as to this claim, and he is not entitled to relief from judgment on the basis of the Supreme Court's opinion in *Banks*.

The district court did not stop after finding that procedural default barred relief. Instead it turned to the substantive allegations to "provide a means of further distinguishing Petitioner's case from *Banks* while affirming this Court's general conviction that this claim remains devoid of merit." It summarized the facts relied upon by petitioner as follows:

> Petitioner supplements his motion for relief with the affidavit[2] of Wayne Morrow, Ronnie McCoy's probation officer, who, apparently in response to McCoy's affidavit disclaiming knowledge as to why his 1988 presentence report[3] states that he was granted immunity in exchange for his testimony against Petitioner, insists that the presentence report is an accurate reflection of what McCoy stated at that time. Petitioner does not explain his delay in submitting this affidavit in October, 2004, more than five years after the McCoy affidavit was entered in habeas proceedings, nor does he allege that it would have been impossible for him to procure the affidavit during the prior habeas proceedings. Further, . . . the affidavit merely presents one party's contrasting recollection of an interview which occurred more than seventeen years ago. . . . The Morrow affidavit . . . is hardly the compelling evidence of an undisclosed deal that the Supreme Court dealt with in *Banks*, wherein the habeas petitioner offered the affidavits of the actual persons whose participation in the state's case against Banks was suppressed by

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[2] Although the district court referred to it as an affidavit, the document in question was styled a "declaration" and was signed by Morrow on September 7, 2004.

[3] The presentence report stated in part, "Defendant was on work release in 1984 when he became involved in a murder case. He stated that he was granted immunity for turning state's evidence."

the state throughout the state-court proceedings.

With respect to fraud on the court, the district court declined to find that any collusion occurred between the prosecutor and McCoy with respect to the affidavits and, in any event, "any fraud . . . was not a fraud directed at the 'judicial machinery' sufficient to compromise the integrity of this Court."

As already discussed, this court will not entertain an appeal from the denial of a Rule 60(b) motion in an AEDPA proceeding unless the petitioner first obtains a COA. *Hardin*, 481 F.3d at 926. A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), which the United States Supreme Court has construed to mean that an applicant must show that reasonable jurists could debate that the petition could have been resolved differently or that the claims raised deserved further review. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Rather than remand to enable petitioner to file an application for a COA, we will construe his notice of appeal as such. Because "[a] Rule 60(b) motion is an appropriate vehicle to bring forward a claim for fraud on the court," *Carter v. Anderson*, 585 F.3d 1007, 1011 (6th Cir. 2009), and petitioner has produced a modicum of evidence in support of this claim, we grant his application for a COA.

Fraud on the court consists of conduct: "1) on the part of an officer of the court; that 2) is directed to the judicial machinery itself; 3) is intentionally false, willfully blind to the truth, or is in reckless disregard of the truth; 4) is a positive averment or a

concealment when one is under a duty to disclose; and 5) deceives the court." *Carter*, 585 F.3d at 1011 (citing *Demjanjuk v. Petrovsky*, 10 F.3d 338, 348 (6th Cir. 1993)). Petitioner has the burden of proving existence of fraud on the court by clear and convincing evidence. *Id.* at 1011-12 (citing *Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 454 (6th Cir. 2008)). He has not done so.

As the district court recognized, while there is some evidence that McCoy received favorable treatment based upon his testimony, it falls far short of definitively establishing that a deal with the prosecution did, in fact, occur. With the exception of the presentence report prepared four years after his testimony and the declaration signed by probation officer Morrow some sixteen years later affirming that the statement "that he was granted immunity for turning state's evidence" came from McCoy, the evidence uniformly refutes the existence of a deal. McCoy so testified at trial and he confirmed that testimony nearly a decade later in a sworn affidavit, as did the prosecutor. As the State points out, trial counsel for petitioner, Jeff Crow, submitted an affidavit during the initial habeas proceedings, in which he asserted, "The State made it clear that it would not prosecute Ronnie McCoy for any involvement in the homicide. To my knowledge, this decision was not part of any deal with Ronnie McCoy." Defense counsel nonetheless asked McCoy about it at trial and McCoy confirmed what counsel had been told by the prosecution.

In sum, petitioner has not come forward with clear and convincing evidence that the prosecution

presented intentionally false material to the district court, a prerequisite to establish a viable fraud on the court claim. *Demjanjuk,* 10 F.3d at 348. We therefore affirm the judgment of the district court denying petitioner's Rule 60(b) motion in appeal 05-6925.

B. Case No. 06-6330

In June 2004, petitioner filed a second motion for equitable relief, the denial of which is the subject of this appeal. In that motion, petitioner contended that the district court erred when it denied a prosecutorial misconduct claim raised in his habeas petition. He asked that the district court revisit its denial of a COA on that claim because an intervening decision from this court, *Hodge v. Hurley,* 426 F.3d 368 (6th Cir. 2005), "squarely rejected the very grounds on which [the district court] previously denied habeas relief and a COA."

The argument that forms the basis of petitioner's prosecutorial misconduct claim includes these comments made during closing argument:

> For Ronnie McCoy to get up here and lie and make all these things just fit in, it would really be just incredible, because he-I'll tell you, my impression of him was this. I believe he was truthful. I believe he got on the stand and bared all. I don't believe he was the most brilliant individual in the world. I believe he was the type of an individual that could have been led by someone like Donnie Johnson. I don't think he was as bad as they want to paint him. . . . I submit to you he got on the stand and bared all. Told you the truth. I

> don't know of any motive that he would have to lie.

Defense counsel did not object to these comments. Despite the lack of an objection, this issue was raised to the Tennessee Supreme Court on direct appeal and it ruled as follows:

> It is insisted by counsel that the trial court erred in permitting the prosecuting attorney to express his personal opinion concerning the credibility of the witness Ronnie McCoy. This matter was not objected to at the time or pursued in the motion for new trial.
>
> It is, of course, improper for an attorney to express his or her personal opinion in the course of final summation. *See State v. Hicks,* 618 S.W.2d 510 (Tenn. Crim. App. 1981). In the present case, however, the argument concentrated upon the evidence in the record concerning McCoy and his credibility and was made in response to attacks upon the witness by counsel for appellant in his closing argument. The form of the argument was in the nature of a summary to the jurors of the evidence in the record rather than personal opinion of the prosecutor concerning matters outside the record. In addition, the trial judge clearly charged the jurors that statements of counsel were not to be considered as evidence. We find no merit to this issue.

Johnson, 743 S.W.2d at 159.

The district court denied this claim when it first considered the habeas petition. It concluded that the

decision of the Tennessee Supreme Court was "neither contrary to, nor an unreasonable application of, clearly established federal law." Assuming that the prosecutor's remarks may have been ill-advised, the district court noted that those remarks must "so infect the trial with unfairness as to make the resulting conviction a denial of due process."

The district court rejected this claim for a second time when it was raised in petitioner's second motion for equitable relief. As it did when denying the motion for equitable relief in appeal number 05-6925, the district court based its authority on Rule 60(b) rather than on any "inherent equitable power" conferred by Article III of the Federal Constitution.

In its order, the district court did not discuss the merits of petitioner's prosecutorial misconduct claim. Rather, it noted simply that "[b]oth this Court and the Sixth Circuit have previously denied Petitioner a COA on his prosecutorial misconduct claim." Thus, "it is clear that Petitioner's request for relief from judgment in the form of a COA is the equivalent of a second or successive habeas petition and must be dismissed for failing to comply with the gatekeeping requirements of 28 U.S.C. § 2244."

As we did in the companion appeal, we construe petitioner's notice of appeal in case number 06-6330 as an application for a COA. That application is denied. In his Rule 60(b) motion petitioner is attacking "[the substance of] the federal court's previous resolution of [the] claim *on the merits.*" *Gonzalez,* 545 U.S. at 532. As recounted above, this claim has already been litigated and resolved. To the extent that petitioner seeks to argue that *Hodge*

represents "a new rule of constitutional law," 28 U.S.C. § 2244(b)(2), he must first obtain leave from this court to file a successive application. 28 U.S.C. § 2244(b)(3)(A). He has not done so. Appeal number 06-6330 is dismissed.

III

In case number 05-6925, a certificate of appealability is GRANTED and the judgment of the district court is AFFIRMED. Case number 06-6330 is DISMISSED pursuant to 28 U.S.C. § 2244.

CLAY, Circuit Judge, dissenting.

This is the second time the majority has denied Petitioner the opportunity to have a hearing on allegations of very serious constitutional deprivations. In *Johnson v. Bell*, 344 F.3d 567 (6th Cir. 2003), the majority denied Petitioner an opportunity to have a hearing on whether his trial counsel's performance was constitutionally deficient in failing to properly investigate mitigating circumstances in the penalty phase trial. As the dissent noted at that time, "The record before the Court, although needing further factual development, provides clear indication that Petitioner's trial counsel failed in their responsibility to investigate and present mitigating evidence at Petitioner's penalty phase trial. Contrary to the majority's conclusion, it cannot be determined, based upon the present record, whether proper representation of Petitioner at the penalty phase trial would have resulted in a different outcome." *Id.* at 578 (Clay, J., dissenting). In that case, Petitioner was entitled to an evidentiary hearing on his ineffective assistance of

counsel claim, just as he is on his claim of fraud on the court in this case.[1]

The district court in the instant case should have held an evidentiary hearing on whether the state committed fraud on the court in the initial habeas proceedings. The majority rejects Petitioner's allegations based on its assertion that Petitioner has failed to come forward with "clear and convincing" evidence of fraud on the court.[2] Notwithstanding the

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[1] Not only is there a potential violation of Petitioner's right to counsel (*see Johnson*, 344 F.3d at 575 (Clay, J., dissenting)) and a potential *Brady* violation based on the withholding of evidence, but Petitioner's claim of prosecutorial misconduct should also succeed on the merits. The prosecutor's statements giving rise to the prosecutorial misconduct claim were inexcusable and clearly violated Petitioner's due process rights. The prosecutor improperly vouched during the trial that he believed McCoy "was truthful. I believe he got on the stand and bared all" and further that "I submit to you that he got on the stand and bared all. Told you the truth." These statements clearly run afoul of the principle that "[i]t is patently improper for a prosecutor ... to comment on the credibility of a witness." *Hodge v. Hurley*, 426 F.3d 368, 378 (6th Cir. 2005). Despite the prosecutorial misconduct evident in this case, I will not address that claim because Petitioner seems unlikely to prevail on the claim for the procedural reasons set forth by the majority opinion.

[2] The issue of the procedural prerequisite for the granting of a certificate of appealability in regards to Rule 60 motions is in some flux. In *United States v. Hardin*, 481 F.3d 924, 926 (6th Cir. 2007), we found that a petitioner "must obtain a certificate of appealability before his appeal of the denial of his Rule 60(b) motion can be heard." In *Kincade v. Sparkman*, 117 F.3d 949, 953 (6th Cir. 1997), the Court held that "district courts must be the initial decision-maker" in a certificate of appealability determination. However, Hardin postdates Petitioner's appeal to this Court, thereby possibly permitting us to excuse the

majority's contentions, Petitioner has undoubtedly raised sufficient questions which should entitle him to an evidentiary hearing on the issue. This is so because if Petitioner was convicted based upon false testimony which was the product of collusion between the prosecutor and the prosecutor's principal witness, then the false testimony would constitute fraud directed at the "judicial machinery" of the court sufficient to compromise the court's integrity. *See Demjanjuk v. Petrovsky,* 10 F.3d 338, 348 (6th Cir. 1993) (noting that fraud on the court is a "fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication").

The circumstances surrounding Ronnie McCoy's initial testimony at Petitioner's trial strongly suggest that McCoy and the prosecution made some sort of deal to protect McCoy from incriminating himself. At the time of the murder, McCoy was on work release from incarceration on a burglary charge. McCoy initially denied knowing anything about the murder of Connie Johnson. Three weeks after the murder, he completely changed his story and came forward to implicate Petitioner. McCoy proceeded to tell police-and then testify under oath-that he discovered Connie Johnson's body, helped Petitioner clean the crime scene, and then disposed of the body in a

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failure to first seek a certificate of appealability in the district court. Since the majority in the instant case addressed the issue on the merits, it is not necessary to resolve this issue, and this dissent will likewise reach the merits.

parking lot. He decided to come forward, in his words, because he did not "need any more time."

Despite McCoy's acknowledgment of his role in disposing of Connie Johnson's body, and the possibility that he might have been involved in her murder, his work release status was not revoked. In fact, McCoy was paroled only two months later. While on parole, McCoy took the witness stand and testified under oath about his participation in helping to clean up the crime scene and dispose of the body of the murder victim. Even if one takes into account the possibility that McCoy arguably could have been coerced, it is nonetheless incredible to contend that a witness would give such incriminating testimony with no assurance of immunity from prosecution. As the Tennessee Supreme Court found in rejecting Petitioner's appeal: "In all events, however, [Petitioner and McCoy] collaborated, willingly or otherwise, in transporting the body of Mrs. Johnson in her 1981 Ford van from the sales office to a shopping center a few miles away. They also placed inside the van her broken spectacles, her shoes, her coat and some earrings which had become dislodged in her struggle for breath. They parked the van on the edge of a large shopping center and left it there." Later the court acknowledged that McCoy may have been an accomplice. *State v. Johnson,* 743 S.W.2d 154, 156-57 (Tenn. 1987).

Notwithstanding the risk McCoy took in providing this sworn testimony, the prosecutor and McCoy both assert in affidavits submitted to the district court that McCoy took this step without any deal or promises of immunity. The prosecutor

acknowledged that McCoy's testimony "would have provided sufficient probable cause to obtain an indictment for improper disposal of a body, and possibly accessory after the fact to murder." The prosecutor further asserted, however, that he "felt it was unlikely that it could be proven that [McCoy's] participation [in the murder] was willing." (J.A. 186-87). The state's official position is that it had no leverage over McCoy, thereby impliedly suggesting that McCoy came forward and testified under oath to his participation in a murder with no assurances from the prosecutor about any future immunity. Furthermore, while it may have been a challenge for the prosecutor to prove McCoy's participation in the actual murder, it would have been equally difficult for the state to prove that Petitioner committed the crime without McCoy's testimony. Therefore, the prosecution was in the position where it needed McCoy's testimony to gain a conviction against Petitioner in the brutal murder of his wife. Nonetheless, the state asserts that it was able to obtain full participation from McCoy, a possible accomplice with a criminal history, without offering him any deal. At the very least, the prosecution's proposed version of events strains credulity; however, the submission of the prosecutor's and McCoy's affidavits in the habeas proceedings, without more, might be insufficient to prove that their actions constituted a fraud on the court-which is the very reason that the interests of justice require an evidentiary hearing where witnesses can be subjected to cross-examination.

It is significant that Petitioner also obtained evidence that McCoy had told a very different story

in another context. A 1988 presentence report in a separate case quotes McCoy as saying that he had received immunity from prosecution for testifying against Petitioner. In McCoy's affidavit presented in the initial habeas proceedings, he claims he does not know how the immunity statement got into his presentence report. Subsequent to the original habeas proceedings, Petitioner obtained a declaration from Wayne Morrow, the probation officer who prepared the presentence report. In the declaration, Morrow swears under penalty of perjury that the statement came from McCoy. Therefore, Petitioner has come forward with the sworn testimony of a person with no incentive to lie which states that McCoy had previously claimed he received immunity for testifying against Petitioner.

The district court-and now the majority-dismisses this evidence based on affidavits provided by the prosecutor, McCoy, and Petitioner's trial counsel. The affidavit from Petitioner's trial counsel does not buttress the prosecution's argument; the affidavit emphasizes that the "state made clear" that it would not prosecute McCoy. The affidavit does not make clear what was the basis for that assertion or how McCoy could risk admitting involvement in a murder without some guarantee that the prosecution would be true to its position. Furthermore, Petitioner's trial counsel's lack of knowledge about a deal would hardly be surprising. If there were a deal which the prosecutor was attempting to conceal, Petitioner's trial counsel would be the last person that the prosecutor would want to know about it. Although Petitioner's trial counsel attempted to question McCoy at trial about the existence of a deal

that McCoy might have had with the prosecutor to provide testimony in exchange for the prosecutor's promise not to prosecute, McCoy simply denied that any deal had been agreed to.

The district court emphasized that McCoy and the prosecutor were the only ones with "contemporaneous personal knowledge concerning the matter," but they are also the people who would have the strongest motivation to conceal any deal that existed. It seems extraordinary just to accept their affidavits as credible simply because they claimed to have had contemporaneous knowledge, particularly where McCoy has been inconsistent and contradictory over time as to whether he was promised immunity by the prosecutor.

Therefore, in considering McCoy's inconsistent positions and the other evidence of an undisclosed deal, the proper course would have been to hold an evidentiary hearing; and this Court should remand this case for such a hearing to be conducted. At such an evidentiary hearing, the district court could consider the testimony of the witnesses, including McCoy and the prosecutor, subject to cross-examination, and determine the credibility of the witnesses and whether the affidavits that were submitted in the initial habeas proceedings were fraudulent. If the district court finds the witnesses credible, it could then conclude that no deal was made, and thus no fraud on the court occurred.

An evidentiary hearing is assuredly a reasonable response to serious allegations of fraud on the court. This Court's most thorough evaluation of a Rule 60(b) motion based on fraud on the court took place in

Demjanjuk v. Petrovsky, 10 F.3d 338, 348 (6th Cir. 1993). In that case, this Court had previously denied the habeas petition of Demjanjuk, an alleged Nazi war criminal. *See Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985). Subsequently, the Court became aware of possible exculpatory evidence that might not have been disclosed to Demjanjuk. Rather than simply conduct an evidentiary hearing, the Court then reopened proceedings and eventually took the much more resource-intensive step of convening a special master to "take testimony and prepare a report on the issue of whether failure of government attorneys to disclose exculpatory information in their possession constituted prosecutorial misconduct or fraud upon the court that misled the court into allowing Demjanjuk to be extradited." *Demjanjuk*, 10 F.3d at 339. Following the special master's report, the Court determined that fraud on the court had been committed and vacated its previous judgment allowing for extradition.

In this case, a remand for an evidentiary hearing is undoubtedly preferable to the majority's position that if the parties to an undisclosed deal continue to assert that no deal exists, it should be impossible for a petitioner to even get the chance to test their assertions by cross-examination. "A rule . . . declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004). Quite simply, without a chance to cross-examine McCoy, the prosecutor, and possibly other witnesses, Petitioner could never prove the existence of a deal. Even though there may have been a deal between McCoy and the prosecution, as

seems likely, apparently there is no quantum of evidence, circumstantial or otherwise, that could convince the majority that an evidentiary hearing is warranted.

The events surrounding McCoy's testimony, in addition to his statements to Morrow, raise a strong probability that a deal was reached that should have been disclosed in conformity with *Brady v. Maryland*, 373 U.S. 83 (1963). Our case law is abundantly clear that "even unspoken, tacit agreements or mutual understandings may constitute evidence favorable to the accused that must be disclosed." *Akrawi v. Booker*, 572 F.3d 252, 263 (6th Cir. 2009). This rule was emphasized in our *en banc* ruling in *Bell v. Bell*, 512 F.3d 223 (6th Cir. 2008). There, we did not find a *Brady* violation, but the prosecutor who may have made a deal specifically testified before the district court on the witness stand that no agreement of any kind had been made. If the prosecutor and McCoy so testify in this case, and the district judge were to credit that testimony, the matter would be settled in the prosecution's favor. Instead, the majority argues for allowing the prosecution to merely file unchallenged affidavits where the very nature of the evidence allegedly withheld prevents Petitioner-without the aid of the truth-seeking device of cross-examination-from discovering irrefutable proof that a deal existed. As the Supreme Court has noted, cross-examination is the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970).

Because the record before this Court indicates a very real possibility that McCoy and the prosecutor

had, at a minimum "reached a mutual understanding, albeit unspoken" that McCoy would not be prosecuted, *Bell*, 512 F.3d at 233, an evidentiary hearing should be held to determine whether the affidavits submitted in the initial habeas proceeding constituted a fraud on the court. Only in that way might we be assured that due process has been afforded, that justice has been done, and that we have avoided the consequences of a mistake, recognizing as we must in a death penalty case such as this that "death is special."

I therefore respectfully dissent.

APPENDIX B

United States Court of Appeals,
Sixth Circuit.

Donnie E. JOHNSON, Petitioner-Appellant,
v.
Ricky BELL, Warden, Respondent-Appellee.

Nos. 05-6925; 06-6330.

Sept. 10, 2010.

Before: DANNY J. BOGGS, ALAN E. NORRIS, and ERIC L. CLAY, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, which was circulated to all active* judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Clay would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

//s//

Leonard Green, Clerk

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* Judge Gibbons recused herself from participation in this ruling.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE -
WESTERN DIVISION

No. 97-3052-D

DONNIE E. JOHNSON, Petitioner,
v.
RICKY BELL, Warden, RIVERBEND MAXIMUM SECURITY INSTITUTION, Respondent.

ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT

Petitioner Donnie Johnson, an inmate at the Riverbend Maximum Security Institution ("RMSI"), in Nashville, Tennessee, has filed a motion requesting relief from this Court's judgment granting Respondent summary judgment as to all claims in his petition for habeas corpus relief.

The pertinent facts and procedural history of this case are laid out in detail in this Court's order granting Respondent summary judgment. See Memorandum and Order on Respondent's Motion for Summary Judgment ("Summary Judgment Order"), R. 84 (March 1, 2001). In short, in October, 1985, a Shelby County, Tennessee, jury convicted Petitioner of first-degree murder in the death of his wife and subsequently sentenced him to death. After the Tennessee Supreme Court affirmed Petitioner's conviction and sentence, *State v. Johnson*, 743 S.W.2d 154 (Tenn. 1987), *cert. denied*, 485 U.S. 994 (1988), Petitioner began a lengthy series of collateral

attacks on the conviction and sentence in the state and federal courts. The Sixth Circuit Court of Appeals affirmed this Court's denial of habeas corpus relief. *See Johnson v. Bell*, 344 F.3d 567 (6th Cir. 2003), *cert. denied*, 541 U.S. 1010 (2004). Petitioner thereafter began the instant course of litigation, seeking relief from this Court's judgment denying his habeas petition pursuant to Fed. R. Civ. P. 60(b) and what he alleges to be this Court's "inherent authority."

The Court initially stayed its consideration of Petitioner's motion pending the Sixth Circuit's decision in *In Re Abdur'Rahman*, 392 F.3d 174 (6th Cir. 2004), *vacated* 545 U.S. , 125 S. Ct. 2991 (2005). *See* Order Granting Stay Of Execution, R. 109 (Nov. 9, 2004). In December, 2004, the Sixth Circuit issued its opinion in *Abdur'Rahman*, addressing the interplay of Rule 60(b) motions for relief from judgment and the AEDPA's restrictions on second and successive habeas petitions. Respondent subsequently moved to vacate the stay of execution entered by this Court, arguing that Petitioner's motion for relief was the fundamental equivalent of a prohibited second or successive petition under the standards set forth in *Abdur'Rahman*. However, the Court held that the law governing the issues raised by Petitioner's motion for relief was still in flux, and, given the United States Supreme Court's grant of certiorari in *Gonzalez v. Crosby*, 545 U.S. ___, 125 S. Ct. 2641 (2005), the most prudent course was for the Court to deny Respondent's motion and extend the stay of execution until the Court may consider Petitioner's motion pursuant to the Supreme Court's

eventual decision in *Gonzalez*. See Order, R. 120 at 4 (June 6, 2005).

In June, 2005, the Supreme Court issued its opinion in *Gonzalez*, clarifying the circumstances under which a Rule 60(b) motion for relief may run afoul of the AEDPA's restrictions on second and successive habeas petitions. The Court held that, in the habeas context, a proper motion for relief from judgment is one that attacks "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez*, 545 U.S. at ___, 125 S. Ct. at 2648. To the extent that a motion for relief from judgment attempts to present "claims" asserting a "federal basis for relief from a state court's judgment of conviction," such a motion is "if not in substance a 'habeas corpus application,' at least similar enough that failing to subject it to the same requirements would be 'inconsistent with' the statute." *Id.* at ___, 125 S. Ct. at 2647. The Court explained that a prohibited "claim" in such a motion may present a new ground for relief or attack the habeas court's "previous resolution of a claim on the *merits*." *Id.* at ___, 125 S. Ct. at 2648 (emphasis in original). Thus, where a motion for relief merely asserts a non-merits based ground for revisiting the prior federal judgment, there is no prohibition on considering the motion for relief as denominated. However, where the motion asserts "claims," including allegations of error on the merits or intervening substantive case law developments, the motion must be treated as a second or successive petition for habeas relief. Proceeding under these standards, the Court will

now address Petitioner's motion for relief from judgment.

As a preliminary matter, consideration should first be given to Petitioner's brief argument that, regardless of what claims are cognizable in this Court pursuant to Rule 60(b), the entirety of Petitioner's motion is within the ambit of this Court's jurisdiction pursuant to its "plenary inherent Article III equitable powers." Petitioner's Motion For Equitable Relief In The Exercise Of This Court's Inherent Article III Powers, And/Or For Relief From Judgment ("Pet. Motion"), R. 104 at 2-3. Petitioner asserts that the powers which he attributes to this Court may not be abridged by Rule 60(b) or congressional enactments such as the AEDPA. Further, Petitioner argues that 28 U.S.C. § 2243, which instructs that a district court exercising its habeas jurisdiction may avail itself of "all the freedom of equity procedure," similarly ensures that this Court may revisit and revise its previous habeas judgments regardless of the restrictions embedded in Rule 60(b) and the AEDPA.

The Court finds this argument unpersuasive. The text of Rule 60(b) makes clear that it is attempting to express the equitable powers courts have long enjoyed when considering previous judgments. After listing several circumstances under which relief from judgment might be appropriate, the rule also allows that a District Court may grant relief from judgment for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). This provision of Rule 60(b) has historically been referred to as a "'reservoir of equitable power' to do justice in a particular case." *In re Abdur'Rahman*,

392 F.3d at 183 (citing *Compton v. Alton S.S. Co., Inc.*, 608 F.2d 96, 106 (4th Cir. 1979)). Indeed, it is this provision of Rule 60(b) that was at issue in both *Abdur'Rahman* and *Gonzalez*. Additionally, the Court notes that Rule 60(b) contains a "savings clause" which recognizes that the rule does not limit the ability of a court to consider an "independent action to relieve a party from judgment or to set aside a judgment for fraud upon the court." Fed. R. Civ. P. 60(b). *See also Chambers v. NASCQ, Inc.*, 501 U.S. 32, 43-44 (1991) (discussing court's traditional "inherent power" to vacate a judgment "upon proof that a fraud has been perpetrated upon the court"). However, though the "savings clause" of Rule 60(b) recognizes the continuing viability of these historical remedies, courts have also developed tests for the propriety of granting relief in such actions which require far more than a district court's simple prerogative or equitable inclinations in a particular case. Rather, "independent actions" and actions to set aside a judgment for fraud upon the court are extraordinary remedies limited to very rare situations. *See Buell v. Anderson*, 48 Fed. Appx. 491, 497-500 (6th Cir. 2002) (discussing "independent actions" and "fraud upon the court actions" as separate entities and setting forth tests for each). Further, such "independent actions" may not be used as a vehicle to re-litigate a previous judgment, and are still subject to the AEDPA and its restrictions on successive habeas petitions to the same extent as are motions for relief proceeding under the express provisions of Rule 60(b). *See Gonzalez v. Sec'y for Dept. of Corr.*, 366 F.3d 1253, 1277 n.11 (11th Cir.

2004) and *Booker v. Dugger*, 825 F.2d 281, 284-85 n.7 (11th Cir. 1987).

Therefore, the Court declines Petitioner's invocation of any "inherent powers" to revise past judgments which are not at least embraced by Rule 60(b). Such an unprincipled exercise of the Court's habeas jurisdiction would circumvent the legislative intent apparent in the AEDPA and render superfluous the express requirements for granting relief from judgment embedded in Rule 60(b). The text of Rule 60(b) and Congress' restrictions on the Court's exercise of its habeas jurisdiction through the AEDPA make clear that the "inherent powers" attributed to the Court by Petitioner are more constrained than he acknowledges. *See Hadix v. Johnson*, 144 F.3d 925, 937 (6th Cir. 1998) (discussing "clear and valid legislative command" requirement for Congress to deny or limit a court's traditional equitable jurisdiction). Where Congress has so conclusively established that this Court may not entertain a second or successive habeas petition, no alleged "inherent power" of this Court may survive such a "clear and valid legislative command." [1] Accordingly, this Court will evaluate Petitioner's motion for relief pursuant to Rule 60(b), as explicated in *Gonzalez*, including, where appropriate, consideration of both the "equitable reservoir" of Rule 60(b)(6) and the Rule's inclusion of the traditional

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[1] There is no question, either, as to the validity of the legislative command denying this Court jurisdiction over second or successive habeas petitions. The Supreme Court has made clear that the restrictions on habeas corpus imposed by the AEDPA are valid. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996).

equitable powers of the court, as referenced in the "savings clause" of the rule. However, the Court will not exercise any alleged "inherent powers" to consider Petitioner's motion for relief where such consideration would run afoul of Rule 60(b) or the AEDPA. Petitioner asserts that he is entitled to relief from the Court's judgment on three of his habeas claims. The Court will address each claim in turn.

I. CLAIM 16 - PETITIONER'S CHALLENGE TO THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING FACTOR

Petitioner attacks this Court's judgment granting Respondent summary judgment on claim 16 of his habeas petition, in which he argued that the heinous, atrocious, or cruel ("HAC") aggravating factor relied upon in sentencing him to death was unconstitutionally vague. The Court ruled that Petitioner had procedurally defaulted this claim due to his failure to raise the claim in the state courts, and also rejected Petitioner's argument that the Tennessee Supreme Court reviewed the constitutionality of the aggravator pursuant to its statutorily required review process. *See* Summary Judgment Order at 231-32. Petitioner asserts that the Sixth Circuit's intervening decision in *Cone v. Bell*, 359 F.3d 785 (6th Cir. 2004), *rev'd* 545 U.S., 125 S. Ct. 847 (2005), makes clear that this Court's finding of procedural default was erroneous and also that he is entitled to relief on the merits of this claim.

In *Cone*, the Sixth Circuit held that the Tennessee Supreme Court's mandatory review of death sentences for arbitrary imposition implicitly

includes review of all claims related to such arbitrariness, whether or not such claims were expressly presented to the state court during review. *Id.* at 793-94. The Sixth Circuit further ruled that the Tennessee Supreme Court's "implicit" decision affirming the constitutionality of the HAC aggravator was "contrary to, or involved an unreasonable application of,"[2] Supreme Court precedent embodied in *Godfrey v. Georgia*, 446 U.S. 420 (1980), and subsequent cases which establish that similarly worded HAC aggravators are impermissibly vague. Finally, the Sixth Circuit held that, because the Tennessee Supreme Court failed to apply a valid narrowing construction to the facially vague HAC aggravator, Cone's sentence violated the Eighth and Fourteenth Amendments. *Id.* at 797.

On appeal, the Supreme Court reversed the Sixth Circuit insofar as it held that the Tennessee Supreme Court failed to cure the invalid aggravator through application of a valid narrowing construction on appeal. The Court ruled that the Sixth Circuit's holding in this regard did not afford the state court sufficient deference under the standard of review required by 28 U. S. C. § 2254, and, further, not only had such a narrowing construction been applied, but that construction itself was constitutionally valid. *See Bell v. Cone*, 545 U.S. ___, 125 S. Ct. 847, 853-55 (2005) (per curiam). Because the Supreme Court declined to address the Sixth Circuit's holding regarding the "implicit review" doctrine in Tennessee, it is likely that portion of the *Cone* opinion retains its precedential value in these proceedings.

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[2] 28 U.S.C. § 2254(d).

In addition to arguing that *Cone* demonstrates error in this Court's finding that Petitioner procedurally defaulted his HAC claim, Petitioner also maintains that *Cone* establishes that he is entitled to relief from judgment on the merits of his HAC claim. However, before the Court may proceed to address his HAC claim on the merits, the Court must first determine whether it may disturb its previous judgment pursuant to Rule 60(b). As discussed above, *Gonzalez* establishes that a motion for relief from judgment which attacks the integrity of a habeas court's judgment on a non-merits basis may proceed without running afoul of the prohibition on second or successive habeas petitions. *Gonzalez*, 125 S. Ct. at 2647-48. Because the petitioner in *Gonzalez* was merely challenging a federal court's erroneous application of the statute of limitations set forth in 28 U.S.C. § 2244, his motion for relief was not the functional equivalent of a prohibited second or successive petition. Similarly, in this portion of Petitioner's motion, he is seeking relief from this Court's failure to reach the merits of his HAC claim due to the imposition of a procedural bar. Accordingly, the Court finds that it may consider Petitioner's motion, to the extent that it seeks relief from this Court's judgment on a non-merits aspect of the prior habeas proceedings, as one properly before the Court pursuant to Rule 60(b) and that such treatment is therefore consonant with the AEDPA's prohibition on second or successive habeas petitions.

Gonzalez is also instructive of how the Court should ultimately dispose of Petitioner's claim that he is entitled to relief on the merits of his HAC claim. In *Gonzalez*, the Court was careful to note that

"several characteristics of a Rule 60 (b) motion limit the friction between the Rule and the successive petition prohibitions of the AEDPA." *Id.* at ___, 125 S. Ct. at 2649. One such characteristic is that the "equitable reservoir" of Rule 60(b)(6) requires, as a predicate to granting relief from a previous judgment, "extraordinary circumstances" [3] which are rarely found in habeas cases. For instance, the Court in *Gonzalez* went on to hold that an intervening Supreme Court decision which demonstrated the district court's erroneous application of § 2244's statute of limitations could not constitute the "extraordinary circumstance" necessary to award relief from the district court's judgment because "[t]he District Court's interpretation was by all appearances correct under the Eleventh Circuit's then-prevailing interpretation of 28 U.S.C. § 2244(d)(2). It is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation." *Id.* at ___, 125 S. Ct. at 2651. The Supreme Court's refusal to deem its decision adopting a contrary interpretation to a statute as a

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[3] The Court notes that Petitioner's motion for relief as to this claim, if it is to be considered pursuant to Rule 60(b), may only proceed under Rule 60(b)(6) 's provision allowing relief "for any other reason justifying relief from the operation of the judgment." Petitioner does not allege that his claim may proceed under any other provision of the rule, and it is apparent that an attempt to avail oneself of intervening case law developments is most properly considered, if at all, pursuant to Rule 60(b)(6). *See. e.g., Abdur'Rahman v. Bell*, 537 U.S. 88, 96-97 (2002) (Stevens, J.) (dissenting from dismissal of writ of certiorari as improvidently granted); *Gonzalez*, 353 F.3d at 1309 (opinion of Tjoflat, J.).

sufficient "extraordinary circumstance" for purposes of Rule 60(b)(6) affirms a fundamental principle of the Rule that pre-dated *Gonzalez*: "It is well established that a change in decisional law, is usually not, by itself, an 'extraordinary circumstance' meriting Rule 60(b)(6) relief." *Blue Diamond Coal Co. v. Trustees of the UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001). Rather, in addition to the change in law, courts have traditionally required "some other special circumstance" in order to grant relief under Rule 60(b)(6). The petitioner in Gonzalez, though merely asserting error in the district court's non-merits adjudication of his habeas claim, failed to proffer such a special circumstance, instead relying only on the intervening decision of the Supreme Court, and was therefore denied Rule 60(b)(6) relief from a district court judgment that the Supreme Court conceded was incorrect.

In this instance, Petitioner's request for relief from judgment relies entirely on the Sixth Circuit's intervening *Cone* decision both to demonstrate the error of this Court's procedural default ruling and to establish that his claim should succeed on the merits. As in *Gonzalez*, it is undisputed that this Court's prior finding of procedural default was correct when it was rendered. The Court's ruling was consistent with Sixth Circuit precedent which had unequivocally rejected the "implicit review" doctrine eventually adopted in *Cone*. *See* Summary Judgment Order, R. 84 at 231 (discussing Sixth Circuit's rejection of "implicit review" doctrine in *Coe v. Bell*, 161 F.3d 320, 336 (6th Cir. 1998)). Petitioner has not shown, under the standards enunciated in *Gonzalez*, how the decision in *Cone* constitutes an

"extraordinary circumstance" sufficient to grant him relief from judgment, where a similar change in law in *Gonzalez* was insufficient for Rule 60(b)(6) relief. Accordingly, the Court finds that Petitioner is not entitled to relief from judgment as to this claim.

Further, the Supreme Court's eventual ruling on the merits in *Cone* buffers this Court's finding that no "extraordinary circumstances" warrant granting Petitioner relief from judgment. The Supreme Court ruled in *Cone* that the Sixth Circuit's decision foreclosing the possibility that the Tennessee Supreme Court applied a valid narrowing construction to the vague HAC aggravator because it "did not apply, or even mention, any narrowing interpretation or cite to"[4] such a construction was incorrect because "[t]he state court's opinion does not disclaim application of that court's established construction . . . [and given that the state court had adopted such a construction and followed it numerous times] absent an affirmative indication to the contrary, we must presume it did the same thing here." *Cone*, 545 U.S. ___, 125 S. Ct. at 853. Thus, where the Tennessee Supreme Court ruled, in its review of Cone's conviction and sentence, that "the evidence abundantly established"[5] the aggravator and that the sentence of death was not disproportionate to similar cases, the United States Supreme Court refused to hold that the state court had failed to subject the vague aggravator to constitutional narrowing.

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[4] *Cone*, 359 F.3d at 797.

[5] *State v. Cone*, 665 S.W.2d 87, 94 (Tenn. 1984).

The Court's holding in this regard was recently applied by the Sixth Circuit Court of Appeals in *Payne v. Bell*, 418 F.3d 644 (6th Cir. 2005), wherein the appellate court ruled, because that case was "materially indistinguishable" from *Cone*, that the Tennessee Supreme Court was entitled to the presumption that it applied a narrowing construction to the vague HAC aggravator, even though it never mentioned the aggravator, because the state court did not indicate that it was not relying on such a construction in affirming Payne's conviction. *Id.* at 657. In Petitioner's case, just as in *Cone* and *Payne*, the Tennessee Supreme Court is entitled to the presumption that it applied such a narrowing construction to the vague HAC aggravator. As in *Cone*, the state court noted the jury's finding of the HAC aggravator and concluded that the "aggravating circumstances were clearly established by the evidence." *State v. Johnson*, 743 S.W.2d 154, 157 (Tenn. 1987). Given that finding and the lack of an indication that it was not following its precedent setting forth a valid narrowing construction to the aggravator, the Tennessee Supreme Court must be presumed to have cured any alleged facial invalidity in the HAC aggravator as applied to Petitioner. Accordingly, the Court finds that, even had Petitioner established some extraordinary circumstance warranting the reopening of his habeas petition pursuant to Rule 60(b)(6), the Supreme Court's decision in *Cone* and subsequent cases establish that he is not entitled to relief on the merits of his HAC claim.

For the same reasons that Petitioner's motion fails under the standards governing Rule 60(b)(6), the

motion similarly must fail as an "independent action" to set aside judgment pursuant to the "savings clause" of Rule 60(b). Relief from judgment by way of an "independent action" is an extraordinary remedy reserved for rare cases characterized by "exceptional circumstances" where relief is necessary to prevent a grave miscarriage of justice should the judgment stand. *Barrett v. Sec'y of Health and Human Serv.*, 840 F.2d 1259, 1263 (6th Cir. 1987). It is apparent that the tests concerning the propriety of granting relief from judgment pursuant to Rule 60 (b)(6) and the "independent action" prong of the "savings clause" involve sufficiently similar equitable considerations that a court should ascribe similar meaning to "extraordinary circumstances" in the Rule 60(b)(6) context and "exceptional circumstances" in the "independent action" context. As demonstrated above, Petitioner has not shown any "extraordinary circumstance" warranting relief from judgment pursuant to Rule 60(b)(6). Further, Petitioner's merits challenge to the HAC aggravator is disposed of by recent opinions of the Supreme Court and Sixth Circuit Court of Appeals. Therefore, Petitioner has not established any "exceptional circumstance" warranting relief from this Court's prior judgment pursuant to the "independent action" prong of the "savings clause." Accordingly, this portion of Petitioner's motion for relief from judgment is DISMISSED.

II. CLAIM 2 - PETITIONER'S CHALLENGE TO THE PROSECUTION'S ALLEGED WITHHOLDING OF EVIDENCE OF A DEAL FOR RONNIE MCCOY'S TESTIMONY

In claim two of his habeas petition, Petitioner alleged that the prosecution knowingly used false testimony and withheld exculpatory evidence of a deal it had reached with Ronnie McCoy in order to obtain his testimony against Petitioner. In support of this claim, Petitioner offered various statements and affidavits which he argued proved that the prosecution withheld evidence and suborned perjury. The Court first held that Petitioner had procedurally defaulted this claim for failing to present the claim in the state courts. *See* Summary Judgment Order at 115. Despite the finding of procedural default, the Court also analyzed the merits of Petitioner's claim and found them to be conclusively devoid of merit. *See id.* at 117. In his motion for relief, Petitioner now appears to assert two separate grounds for relief from the Court's previous judgment: 1) Petitioner argues that the Supreme Court's intervening decision in *Banks v. Dretke*, 540 U.S. 668 (2004), makes clear that this Court's prior finding of procedural default was erroneous; and 2) the state's withholding of evidence, subornation of perjury, and presentation of false affidavits during habeas proceedings constitute a fraud on the habeas court. The Court will address each of Petitioner's claims for relief in turn.

A. *Banks* and The Court's Finding of Procedural Default

In *Banks*, the Supreme Court, in relevant part, held that a federal habeas petitioner was entitled to

present evidence of an alleged violation of his due process rights pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), despite his failure to develop the claim in the state courts, because he had alleged such a violation in state post-conviction proceedings and the state had precluded him from further developing the claim by vigorously denying that any such violation had occurred. *See Banks*, 540 U.S. at 702-03. The Court reasoned that Banks was entitled to rely on the veracity of assertions made by the state in contesting his *Brady* claim, therefore providing him with "cause" for his failure to fully develop the claim in the state courts. *Id.* at 698.

Petitioner asserts that the "circumstances surrounding Mr. Johnson's McCoy Claim are virtually identical to the circumstances involved in *Banks*." Pet. Motion at 24. This contention ignores an essential point which distinguishes his case from *Banks*: Unlike the petitioner in *Banks*, Petitioner has failed to exhaust his remedies as to this claim in the state courts. As a predicate to the Court's holding that Banks had proven sufficient "cause" for his failure to fully develop his *Brady* claim in the state courts, the Court first addressed whether Banks had satisfied the exhaustion requirement by alleging a violation of his *Brady* rights in the state courts:

> To pursue habeas corpus relief in federal court, Banks first had to exhaust "the remedies available in the courts of the State." Banks alleged in his January 1992 state-court application for a writ of habeas corpus that the prosecution knowingly failed to turn over exculpatory evidence involving Farr in

> violation of Banks's due process rights. Banks thus satisfied the exhaustion requirement as to the legal ground for his Farr *Brady* claim.

Banks, 540 U.S. at 690 (citations omitted). Thus, only after first confirming that the petitioner had indeed exhausted his state-court remedies with respect to his Brady claim, did the Supreme Court proceed with its inquiry as to whether sufficient "cause" existed to excuse the failure to fully develop the claim in the state courts.

Though the Court in *Banks* was careful to note that it was concerned with a claim which "arose under the regime in place prior to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)," *id.* at 689, the exhaustion requirement discussed by the Court is equally applicable to cases, including this one, which are adjudicated under the standards imposed by the AEDPA. *See e.g., Baldwin v. Reese*, 541 U.S. 27 (2004) (discussing requirements of exhaustion and "fair presentation" under the standards required by 28 U.S.C. § 2254, as amended by the AEDPA). It is uncontested that Petitioner wholly failed to raise his *Brady* claim in any state court proceeding. Though defendants are not required to "scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed," *Banks*, 540 U.S. at 695, the state courts are entitled to fair presentation of any claim that a defendant's constitutional rights have been violated, and Petitioner has failed, both in prior summary judgment and in current proceedings, to explain whether the evidence he offered in support

of this claim was unavailable during state-court proceedings or how the evidence eventually became available to him. He certainly does not assert that the evidence he now proffers in support of this claim was previously rendered unavailable due to the conduct of the state. Indeed, these failures of Petitioner were the basis of this Court's previous finding that Petitioner has procedurally defaulted this claim. *See* Summary Judgment Order at 115. In his motion for relief, Petitioner, rather than addressing the basis for the Court's prior holding, has merely offered the Supreme Court's holding in *Banks* while simultaneously failing even to attempt to demonstrate why he should be allowed, under *Banks*, to present a claim in federal court which he never presented, much less developed, in the state courts, as the Court explicitly required in *Banks*. *Banks* stands for the proposition that a habeas petitioner may avoid a procedural bar in federal habeas proceedings with respect to claims which were alleged in state court but were not fully developed due to the conduct of the state. *Banks* does not excuse a habeas petitioner from a procedural bar with respect to claims he has wholly failed to even allege in the state courts, but subsequently decided to make a go at in the federal courts on the basis of evidence available to him prior to state-court proceedings. Accordingly, because Petitioner failed to exhaust his state-court remedies, he has not demonstrated error in this Court's prior finding of procedural default as to this claim, and he is not entitled to relief from judgment on the basis of the Supreme Court's opinion in *Banks*.

Moreover, Petitioner has also failed to rebut the Court's prior holding that this claim is, aside from being defaulted, clearly devoid of merit.[6] In short, the Court previously ruled that Petitioner's allegations of an illicit and undisclosed deal for McCoy's testimony were not sufficiently supported by the various statements and inconsistencies highlighted by the Petitioner. Further, the Court found that such evidence was far outweighed by the evidence refuting such a "deal," consisting of the sworn statements of McCoy, the prosecutor, and petitioner's trial counsel, due to those statements' clarity and lack of equivocation:

> The various ambiguous bits of evidence put forward by petitioner are not sufficient to undermine the credibility of the unambiguous sworn denials of every individual with contemporaneous personal knowledge

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[6] Of course, the Court notes that to the extent Petitioner might intend to argue error in this Court's holding that this claim is substantively without merit, he is precluded from doing so in a Rule 60(b) motion for relief from judgment due to the prohibition on second or successive habeas petitions. *See Gonzalez*, 545 U.S. at___, 125 S. Ct. at 2649 ("a Rule 60(b) motion that seeks to revisit the federal court's denial on the merits of a claim for relief should be treated as a successive habeas petition") (emphasis in original). Accordingly, because the Court has already held that Petitioner is not entitled to relief from judgment because he cannot demonstrate clear error in this Court's finding of procedural default, the Court's forthcoming discussion of the merits of the claim in light of Petitioner's newly proffered evidence is provided merely as a means of further distinguishing Petitioner's case from *Banks* while affirming this Court's general conviction that this claim remains devoid of merit.

> concerning the matter. Accordingly, the Court holds that petitioner has failed to establish the first two components of a Brady violation: the existence of material evidence favorable to the accused and suppression of that evidence by the prosecution.

Summary Judgment Order at 117. Petitioner supplements his motion for relief with the affidavit of Wayne Morrow, Ronnie McCoy's probation officer, who, apparently in response to McCoy's 1999 affidavit disclaiming knowledge as to why his 1988 presentence report states that he was granted immunity in exchange for his testimony against Petitioner, insists that the presentence report is an accurate reflection of what McCoy stated at that time. Petitioner does not explain his delay in submitting this affidavit in October, 2004, more than five years after the McCoy affidavit was entered in habeas proceedings, nor does he allege that it would have been impossible for him to procure the affidavit during the prior habeas proceedings. Further, even were the Court to credit the Morrow affidavit as truthful, despite Petitioner's lack of diligence in offering it to the Court,[7] the affidavit merely presents

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[7] The Court also notes that, to the extent Petitioner might offer the Morrow affidavit as newly discovered evidence entitling him to relief from judgment pursuant to Rule 60(b) (2), this Court is prohibited from entertaining the evidence as such due to lapse of the one-year time period for submitting newly discovered evidence in a motion for relief from judgment. *See In re G.A.D., Inc.*, 340 F.3d 331, 334 (6th Cir. 2003) (holding that" [r]egardless of the circumstances, no court can consider a motion for relief brought under Rule 60(b)(1), (2), or (3) a year after judgment"); *see also Conner v. Attorney General of U.S.*, 96 Fed.

one party's contrasting recollection of an interview which occurred more than seventeen years ago, and in no way conclusively establishes the veracity of Petitioner's allegation that a deal was concocted for McCoy's testimony. The Morrow affidavit, though perhaps probative of Petitioner's claim if it had been properly submitted to the Court while its consideration of the claim was ripe, is hardly the compelling evidence of an undisclosed deal that the Supreme Court dealt with in *Banks*, wherein the habeas petitioner offered affidavits of the actual persons whose participation in the state's case against Banks was suppressed by the state throughout state-court proceedings. In other words, in *Banks* the petitioner proffered evidence of such a nature that it's rough equivalent in Petitioner's case would be a sworn statement of Ronnie McCoy attesting that he had indeed received a "deal" for his testimony. Petitioner has clearly failed to offer evidence of such a conclusive nature, and therefore has not sufficiently "undermine[d] the credibility of every witness with contemporaneous personal knowledge of the matter" such that this Court no longer has confidence in the propriety of its previous finding that this claim lacks substantive merit.

At any rate, as discussed above, Petitioner's newly proffered evidence that a "deal" existed is relevant only if he can demonstrate that he is entitled to have his habeas petition reopened

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Appx. 990 (6th Cir. 2004) (holding motion for relief based on newly discovered evidence, misrepresentation, and misconduct untimely because it was filed more than one year after dismissal).

pursuant to Rule 60(b). Given that Petitioner failed to exhaust his state-court remedies by presenting this claim in the state courts, as required by the Supreme Court in *Banks*, he cannot demonstrate error in this Court's previous finding of procedural default and he is not entitled to have his habeas petition reopened for the consideration of new evidence. Further, even if this Court was persuaded that its finding of procedural default was rendered erroneous by *Banks*, Petitioner would still be required, as with his HAC claim, to demonstrate some "extraordinary circumstance" justifying the reopening of his habeas petition. As discussed *supra*, pgs. 9-12, such "extraordinary circumstances" are rarely demonstrated in habeas cases, and are surely absent from Petitioner's argument with respect to this claim, particularly given Petitioner's failure to conclusively establish that an undisclosed deal was made and his lack of diligence in proffering what evidence he has in support of the claim. *See Gonzalez*, 545 U.S. __ , 125 S. Ct. at 2651 (holding, despite a conceded change in law demonstrating error in a district court's application of a statute of limitations, that such a change in law was, in-part, "all the less extraordinary in petitioner's case, because of his lack of diligence in pursuing review" of the issue) Accordingly, for all the reasons given above, this portion of Petitioner's motion for relief from judgment is DISMISSED.

B. Fraud upon the Court

As a closely related component to Petitioner's *Banks* claim, Petitioner asserts that he is entitled to

relief from judgment due to fraud upon the court.[8] Petitioner argues that the Morrow affidavit which he submitted with his motion for relief demonstrates inherent falsity in the Ronnie McCoy affidavit which the state submitted to counter the *Brady* allegation first raised in Petitioner's habeas corpus application. Thus, Petitioner argues, McCoy and the state "lied" in submitting false affidavits to this Court during habeas proceedings and continuing to deny that any deal existed for McCoy's testimony.

Petitioner fails to properly set forth the elements of a fraud upon the court claim or to demonstrate how his claim satisfies those elements. In order to reopen a judgment that was obtained through fraud upon the court, Petitioner must demonstrate that during the prior habeas proceedings there was conduct that was 1) on the part of an officer of the court; 2) directed to the "judicial machinery" itself; 3) intentionally false, wilfully blind to the truth, or was in reckless disregard for the truth; 4) a positive averment or concealment when one was under a duty to disclose; and 5) that deceived the court. *Workman*

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[8] As noted earlier, supra p. 22 n.7, this Court may not consider Petitioner's motion as one made pursuant to Rule 60(b)(1), (2), or (3) due to lapse of the one-year time period for filing a motion for relief pursuant to one of those provisions. Therefore, the Court will not entertain Petitioner's fraud claim pursuant to Rule 60(b)(3), allowing relief from judgment for "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." Fed. R. Civ. P. 60(b)(3). Accordingly, if the Court is to consider Petitioner's fraud claim it must do so under the confined standards of the independent action to "set aside a judgment for fraud upon the court" provided for by the "savings clause" of Rule 60(b)(6).

v. Bell, 245 F.3d 849, 852 (6th Cir. 2001) (citing *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993)).

Given these requirements, Petitioner's fraud claim fails on many levels. First, Petitioner is required to show that counsel for Respondent engaged in the conduct which he considers fraudulent. *See H.K. Porter Co., Inc. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1118-19 (6th Cir. 1976) (holding, upon allegation that adverse counsel sponsored non-disclosure and perjury, "[s]ince attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court"). The persons with which Petitioner appears to be most concerned are Ronnie McCoy, accused of lying in an affidavit submitted to the Court, and the attorney who prosecuted Petitioner's case at trial, also accused of lying in an affidavit submitted to the Court.[9] At no point in his motion for relief does Petitioner so much as allege, much less actually demonstrate, that specifically Respondent's counsel knowingly

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[9] In his motion for relief, Petitioner set forth his argument that a fraud on the court occurred as follows:

> New evidence thus clearly indicates that during this Court's previous consideration of the McCoy Claim, a fraud was perpetrated on this Court. The state filed an affidavit containing the false statements of Ronnie McCoy. Coupled with the prosecution's (and McCoy's) denial that McCoy received any consideration from the police or the prosecution, there are clear grounds for this Court to revise its judgment, where such circumstances indicate that this Court denied relief based on false affidavits and the prosecution's misrepresentations at trial - which were included in the record reviewed by this Court.

Pet. Mot. at 27.

submitted false affidavits before this Court during habeas proceedings. Thus, Petitioner has failed to show fraudulent conduct on the part of an officer of the court, appearing as such before this Court, during prior proceedings.

Further, even if the Court were to concur with Petitioner regarding the conduct which he deems fraudulent, such conduct was not directed at the judicial machinery itself. In other words, conduct sufficient to satisfy the independent "fraud upon the court" inquiry has traditionally been confined to conduct which deliberately seeks to harm the integrity of the judicial process. Therefore, many courts have deemed mere perjury and non-disclosure by witnesses a specie of fraud insufficient to justify vacating a previous judgment. *See, e.g., In re Levander*, 180 F.3d 1114, 1119-20 (9th Cir. 1999) (explaining that perjury and non-disclosure are not "fraud upon the court" when party has ability to challenge the alleged perjured testimony because the testimony is relevant to an issue before the court); *Gleason v. Jandrucko*, 860 F.2d 556, 558-560 (2nd Cir. 1988) (holding" [a]fter discovered evidence of alleged perjury by a witness is simply not sufficient for a finding of 'fraud upon the court'" because such conduct effects injury to a single litigant, rather than a subversion of the court's integrity) (citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245 (1944)). Given the above, the Court cannot consider the conduct complained of by Petitioner, the submission of allegedly false affidavits by two witnesses to the prior habeas proceedings, conduct which subverted the Court's integrity during those proceedings, particularly where Petitioner cannot

show that counsel for Respondent knowingly submitted any such false affidavits.

Given the conduct which Petitioner alleges was fraudulent, and his failure to demonstrate that Respondent's counsel was responsible for that conduct, Petitioner's case is closely analogous to *Fierro v. Johnson*, 197 F.3d 147 (5th Cir. 1999). In *Fierro*, a death-sentenced inmate sought to vacate the federal habeas court's judgment denying his habeas petition on the ground of fraud upon the court. The petitioner offered newly-discovered evidence which showed that a witness had perjured himself during state court proceedings, and he alleged that both the prosecuting attorneys, in state-court, and the state's postconviction attorneys, in federal habeas proceedings, should be held to have constructive knowledge of the perjury sufficient to have endorsed it and thus perpetrated a fraud upon the court. The Fifth Circuit refused to extend any constructive knowledge of the perjury to the state's habeas attorneys merely because they were defending a conviction reliant on that perjury. *Id.* at 155-56. In this case, though the state's habeas attorneys submitted a new affidavit from McCoy, given that Petitioner does not even allege, much less prove, that the state's habeas attorneys knew of the affidavit's purported falsity, the Court will not assume such a collusion occurred. Given all of the above, the Court holds that 1) Petitioner has failed to demonstrate any fraudulent conduct on the part of an officer of the court during prior proceedings; and 2) any fraud that occurred was clearly an injury germane to Petitioner as a single litigant, and was not a fraud directed at the "judicial machinery"

sufficient to compromise the integrity of this Court. Accordingly, Petitioner's fraud upon the court claim is DISMISSED.

III. CLAIM 15 - PETITIONER'S CHALLENGE TO SENTENCING-STAGE JURY INSTRUCTIONS

In claim 15 of his habeas petition, Petitioner argued that his Sixth, Eighth, and Fourteenth Amendment rights were violated by several aspects of his sentencing-stage jury instructions. The Court found each of these contentions procedurally defaulted and/or without merit. *See* Summary Judgment Order at 221-228. Petitioner now asserts that he is entitled to relief from the Court's judgment on his claim that the jury instructions regarding unanimity in sentencing violated his Eighth Amendment rights. This Court found that Petitioner had procedurally defaulted this claim by failing to challenge that part of the instructions in the state courts. However, this Court also found the claim to be without merit, first explaining that two types of objections have been raised with respect to the unanimity instruction: 1) that the instruction requires a jury to be unanimous with respect to the presence of a mitigating factor, and 2) that the instruction does not inform the jury that a life sentence results if they fail to reach a unanimous verdict. Though this Court was unsure which particular claim Petitioner was raising, the Court found them both to be without merit, having been recently addressed and disposed of by the Sixth Circuit in *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998). In his motion for relief, Petitioner now asserts that this Court's judgment was erroneous, as

demonstrated by the Sixth Circuit's decision in *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003).

Before evaluating the merits of Petitioner's motion for relief as to this claim, the Court must again determine whether the claim is cognizable in a motion for relief from judgment. Petitioner may challenge the Court's prior resolution of this claim on a nonmerits basis, which he does in arguing that the Court's failure to reach the merits due to the imposition of a procedural bar was erroneous in light of Cone. However, even assuming that Petitioner may successfully demonstrate error in the previous finding of procedural default, Petitioner still must demonstrate some "extraordinary circumstance" in the Rule 60(b)(6) context or "exceptional circumstance" in the "independent action" context in order for the Court to grant relief from judgment and proceed with consideration of the merits of Petitioner's claim. Given that the Supreme Court failed to find any "extraordinary circumstance" warranting relief from judgment in *Gonzalez*, despite the Court's acknowledgment that the petitioner in that case was prevented from presenting a claim due to the erroneous interpretation of a statute of limitations, Petitioner bears a significant burden in proving some "extraordinary circumstance" warranting him relief from this Court's previous judgment imposing the bar of procedural default. Petitioner has failed to demonstrate such a circumstance.

Moreover, Petitioner's claim in this regard is rendered even less extraordinary, or exceptional, because the intervening case law Petitioner offers in

his motion for relief cannot be applied in his case. In *Davis*, the Sixth Circuit held invalid unanimity instructions which, in their totality, impermissibly "'would' lead a reasonable juror to conclude that the only way to get a life verdict is if the jury unanimously finds that the aggravating circumstances do not outweigh the mitigating circumstances." *Davis*, 318 F.3d at 689. The jury instructions at issue in that case had such an effect because 1) the instruction first required that the jury unanimously reject the death penalty before it could consider a life sentence; 2) the verdict forms provided the jury implied, largely because the form set forth twelve signature lines below the finding, that unanimity was required in any finding that the aggravating circumstances do not outweigh any mitigating circumstances; and 3) the jury was never informed that individual jurors may consider mitigating circumstances whether or not other jurors agree with such evidence in mitigation. The Sixth Circuit's holding in *Davis* relied on the Supreme Court's ruling in *Mills v. Maryland*, 486 U.S. 367 (1988), wherein the Court held unconstitutional instructions which might lead reasonable jurors to believe that they are "precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Id.* at 384.

The Court need not assess whether the unanimity instruction given Petitioner's jury violated the rule announced in *Mills* and applied in *Davis* because assuming, without holding, such a violation occurred, Petitioner's claim is nonetheless hardly exceptional because he may not avail himself of the

rule announced in *Mills*. *Mills* announced a new rule of constitutional law. *See Beard v. Banks*, 542 U.S. 406, 124 S. Ct. 2504, 2513 (2004). Further, the *Mills* rule satisfies neither of the two tests for retroactivity set forth in *Teague v. Lane*, 489 U.S. 288 (1989). *Beard*, 542 U.S. at ___, 124 S. Ct. at 2515. Thus, the *Mills* rule may not be applied retroactively to cases where the conviction has become final prior to *Mills*. Petitioner's conviction became final on April 4, 1988, when the Supreme Court denied certiorari review of the Tennessee Supreme Court's decision affirming his conviction and sentence. *See Johnson v. Tennessee*, 485 U.S. 994 (1988). *Mills* was decided a mere two months later, on June 6, 1988. *Mills*, 486 U.S. 367. While the time period between the two relevant actions by the Supreme Court is admittedly slight, proximity in time is irrelevant for *Teague* retroactivity purposes when a conviction becomes final prior to the announcement of a new rule. Indeed, though the petitioner in *Beard* missed the "deadline" by a mere eight months, the Court nonetheless refused to apply *Mills* to his case retroactively. *See Beard*, 542 U.S. at ___, 124 S. Ct. at 2508.

Therefore, Petitioner's argument that he is entitled to relief from judgment as to this claim is unavailing. Petitioner has not set forth any extraordinary circumstance justifying reopening his habeas petition claim because Petitioner cannot even demonstrate that he is entitled to the benefit of the change in law reflected in the intervening case law he asserts as the basis for relief from judgment. Accordingly, Petitioner's motion for relief from judgment as to this claim is DISMISSED.

IV. CONCLUSION

For all of the reasons given above, Petitioner is not entitled to relief from this Court's previous judgment granting Respondent summary judgment as to each claim Petitioner's habeas corpus application. Accordingly, the Court DISMISSES Petitioner's motion for relief from judgment.

IT IS SO ORDERED, this 1st day of December, 2005.

//s//

BERNICE BOUIE DONALD
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE - WESTERN DIVISION

No. 97-3052-D

DONNIE E. JOHNSON, Petitioner,

v.

RICKY BELL, Warden, RIVERBEND MAXIMUM SECURITY INSTITUTION, Respondent.

MEMORANDUM AND ORDER ON RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

***

B. The prosecution knowingly used false testimony and withheld evidence at the guilt state of the trial (Claim 2)

Claim 2 of the Petition alleges that the prosecution knowingly used false testimony and withheld exculpatory evidence at the guilt stage of the trial. *See* Petition at 27-31. The Petition sets forth eighteen specific instances of alleged prosecutorial misconduct. As respondent notes in his Answer, petitioner did not raise any of these claims in state court. *See* Answer at 28-34. Petitioner does not seriously dispute this, and he also does not furnish any information concerning his discovery of the factual bases of these claims that would permit a finding that he has shown cause for this procedural default.

There is no mystery concerning the reason for these apparent lapses. As is set forth in more detail below, petitioner has no credible claim that the prosecutors withheld evidence or suborned perjury. An analysis of the factual record indicates that this claim has been concocted out of commonplace inconsistencies in the testimony and documentary evidence. Accordingly, the Court grants summary judgment for respondent on this claim.

1. The Legal Standards

The Supreme Court held in *Brady v. Maryland*, 373 U.S. 83, 87 (1963), "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to quilt or to punishment, irrespective of the good faith or bad faith of the prosecution." This duty to disclose "is applicable even though there has been no request by the accused . . . , and . . . the duty encompasses impeachment evidence as well as exculpatory evidence." *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (citations omitted). A *Brady* violation can also arise from the prosecution's knowing use at trial of perjured testimony. *See Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (citing *United States v. Agurs*, 427 U.S. 97, 103-04 (1976)); *accord Coe v. Bell*, 161 F.3d 343. "'The burden is on the defendants to show that the testimony was actually perjured, and mere inconsistencies in testimony by government witnesses do not establish knowing use of false testimony.'" *Coe*, 161 F.3d at 343 (quoting *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989)).

A *Brady* violation has three components:

> The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Strickler, 521 U.S. at 281-82.[77]

Evidence is "material" for *Brady* purposes if "there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Id.* at 281; *see also United States v. Bagley*, 473 U.S. 661, 682 (1985).

> [A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant. . . . *Bagley's* touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial

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[77] The Supreme Court noted that, where a claim was not raised in state court because of an allegation that the prosecutor suppressed evidence, a showing of "cause and prejudice [for the procedural default] parallel two of the three components of the alleged *Brady* violation itself." *Id.* at 282.

> resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." . . .

Kyles, 514 U.S. at 434 (citations omitted). This standard is similar to the "prejudice" component of an ineffective assistance of counsel claim. *See id.* at 436; *see also Bagley*, 473 U.S. at 682.[78] Moreover, materiality is to be evaluated "in terms of suppressed evidence considered collectively, not item by item." *Id.* at 436 (footnote omitted).

2. Application to petitioners claims

a. The alleged "deal" for Mr. McCoy's testimony

Petitioner first complains that the prosecution elicited false testimony from Mr. McCoy that no deal existed for his testimony, and he further complains that the State improperly withheld evidence of such a deal. *See* Petition, Claim 2(A); *see also* Addendum 1, Vol. 3, at 354 (testimony of Mr. McCoy). The only reference to this issue in the state-court proceedings was an oblique statement during petitioner's testimony on his ineffective assistance of counsel claim during the state post-conviction proceeding to the effect that Mr. McCoy had told him he would be charged with the murder it he did not testify against petitioner. *See* Addendum 13, Vol. 4, at 376, 377. The issue was not raised in any petition or brief filed

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[78] The Supreme Court further explained that, unlike various types of trial error, a harmless error analysis is not appropriate. *See Kyles*, 514 U.S at 435-36.

by or on behalf of petitioner, nor was it addressed in any state court opinion.[79]

Petitioner attempts to excuse this apparent procedural default by invoking prosecutorial misconduct. *See* P. Br. at 60-61. Here, however, petitioner has not provided any explanation for his "discovery" of this alleged "deal" that would permit this Court to hold that he has shown good cause for his failure to develop the issue in state court.[80]

The Court also finds that petitioner has failed to present any credible evidence that the State had entered into a "deal" for Mr. McCoy's testimony. Petitioner's evidence of a "deal" consists of the following:

(a) a statement in a declaration submitted by Leslie Fatowe, Esq., an associate in the firm representing petitioner at trial, that "[t]o the best of my recollection, prior to Mr. Johnson's trial, it was common knowledge among Firm members that Mr. McCoy had worked out a deal for testimony the State wanted him to provide at Mr. Johnson's trial";[81]

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[79] As previously noted, *see supra* pages 77, 91 n.63, in state court petitioner only raised a claim that trial counsel were ineffective for failing to argue that the State had made a deal for Mr. McCoy's testimony.

[80] During the hearing on the first post-conviction petition, the prosecutor offered to testify as to the existence of a deal and post-conviction counsel did not take him up on that offer. *See* Addendum 13, Vol. 4, at 351. In that regard, the trial court judge advised post-conviction counsel that "if you have got specific allegations that you can prove that there was a deal, then let's prove it." *Id.* at 352.

[81] Declaration of Leslie Fatowe, Esq., dated Apr. 7, 1999, ¶ 6. Of course. the statement of Ms. Fatowe, if credited, would

(b) Mr. McCoy's December 28, 1984 statement to the police, in which he listed his address as "4170 Slumber Lane" rather than the Penal Farm;

(c) a subpoena issued to Mr. McCoy in connection with petitioner's preliminary hearing in January, 1985 that listed his address as "4170 Slumber Lane" rather than the Penal Farm; and

(d) a Presentence Report on Mr. McCoy, dated July 14, 1988, which stated that "[d]efendant was on work release in 1984 when he became involved in a murder case. He stated that he was granted immunity for turning state's evidence."[82]

Significantly, petitioner has not stated when and under what circumstances he became aware of this

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conclusively establish that there was no *Brady* violation. As the Sixth Circuit explained:

> There is no violation "where a defendant 'knew or should have known the essential facts permitting him to take advantage of any exculpatory information,' or where the evidence is available . . . from another source," because in such cases there is really nothing for the government to disclose.

Coe v. Bell, 161 F.3d at 344 (citations omitted).

It seems that petitioner could not decide whether to argue that prosecutors unlawfully suppressed the existence of a "deal" or that defense counsel made the deliberate decision not to use their knowledge of such a "deal" in order to aid Mr. McCoy at petitioner's expense. *See supra* page 63 n.42 (Claim. 1). He attempts to resolve the issue by making both arguments. There is, of course, another possibility: that the State did not, explicitly or implicitly, promise Mr. McCoy anything of value in exchange for his testimony.

[82] Each of these documents was submitted as an exhibit to petitioner's Memorandum in Support of Leave to Conduct Discovery, dated April 12, 1999 (Docket Entry 53).

evidence. Indeed, he has not even stated that this evidence was not available to him either at trial or, in the case of the Presentence Report, at the hearing on the post-conviction petition.[83] Accordingly, the Court finds that petitioner's claim that the prosecution suppressed evidence of a deal with Ronnie McCoy has been procedurally defaulted.

Moreover, petitioner's claim is totally lacking in substantive merit. In response to petitioner's motion to conduct discovery, respondent submitted the affidavits of Ken Roach, the prosecutor who tried the case in state court, and of Ron McCoy. Mr. Roach stated as follows:

> [A]lthough [McCoy's] statement would have provided sufficient probable cause to obtain an indictment for improper disposal of a body, and possible accessory after the fact to murder, given his stated fear of Donnie Johnson, and the coercive nature of the circumstances, I felt it unlikely that it could be proven that his participation was willing. Given the available proof and the limited sentences for those crimes, it was determined that the State would not seek a prosecution of

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[83] The Court notes that, in a June 4, 1999 Order (Docket Entry 72), Judge Turner denied petitioner leave to conduct discovery on this issue on the ground that petitioner had not established cause for his procedural default. Judge Turner based his ruling in part on Petitioner's failure to explain why he did not offer Mr. McCoy's 1988 presentence report at his March 1989 post-conviction hearing. *See id.* at 5. Despite this ruling, petitioner still has not offered an explanation for his failure to develop this issue in state court.

> Mr. McCoy. This decision was unrelated to his testimony.
>
> The decision not to prosecute Ronnie McCoy was well known at the time. No attempt was made to hide the information from anyone.
>
> My recollection is that Mr. McCoy was very cooperative at all times. He had previously made a full statement to the police regarding his knowledge of the murder.
>
> No deals were made with Mr. McCoy in exchange for his testimony. To the best of my recollection, at some point during my pre-trial interview of Mr. McCoy, I did advise him that the State did not intend to press charges against him.
>
> I took no steps to obtain early release or other preferential treatment on behalf of Ronnie J. McCoy, nor, to my knowledge, did any other member of my office.

Affidavit of Ken Roach, Esq., sworn to Apr. 21, 1999, at pp. 1-2.[84]

Likewise, Mr. McCoy also submitted an affidavit in which he stated the following:

> I was given no grant of immunity or made any promises regarding favorable treatment in exchange for my testimony.
>
> I knew that the State did not intend to prosecute me for helping to move the body.

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[84] This affidavit was filed with this Court April 27, 1999 (Docket Entry 57).

> I have seen the presentencing report from 1988 which says that I was given immunity. I do not know why the report says that.

Affidavit of Ronnie Joe McCoy, sworn to on Apr. 30, 1999, at pp. 1-2.[85]

The various ambiguous bits of evidence put forward by petitioner are not sufficient to undermine the credibility of the unambiguous sworn denials of every individual with contemporaneous personal knowledge concerning the matter. Accordingly, the Court holds that petitioner has failed to establish the first two components of a *Brady* violation: the existence of material evidence favorable to the accused and suppression of that evidence by the prosecution. Because there was no "deal", the Court

[85] Mr. McCoy's affidavit was submitted May 5, 1999 (Docket Entry 60). The affidavits of petitioner's trial counsel also deny any knowledge of a deal. Thus, Jeff Crow stated as follows:

> [D]uring the early states of the investigation of the case, it became clear that the State's primary witness was Ronnie J. McCoy. The State made it clear that it would not prosecute Ronnie McCoy for any involvement in the homicide. To my knowledge, this decision was not a part of any "deal" with Ronnie McCoy. It was specifically denied that McCoy had been granted immunity or given a deal by the prosecutor.

Affidavit of Jeff Crow, Esq., sworn to Apr. 27, 1999, at p. 1 (Docket Entry 57). Likewise, Clark Washington stated simply that "[t]here was not any knowledge in the law firm of any type of immunity grant for Ronnie J. McCoy." Affidavit of W. Clark Washington, Esq., sworn to Apr. 27, 1999, at p. 1 (Docket Entry 57)

declines to speculate on the possible effect of such hypothetical evidence on the jury.

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